TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 440.

THE SAINT PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN R. DONOHUE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED SEPTEMBER 3, 1907.

(20,843.)

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1 STATE OF MINNESOTA:

Supreme Court, October Term, 1906.

State of Minnesota, District Court, County of Itasca.

JOHN R. DONOHUE, Plaintiff,

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, Defendant.

Summons.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, of which a copy is hereto annexed and herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber at his office in the City of St. Paul, in the County of Ramsey, State of Minnesota,
2 within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in said complaint, together with the costs and disbursements of this action.

J. R. DONOHUE,
Attorney for Plaintiff,
610 *Pioneer Press Bldg., St. Paul, Minn.*

(Title of Cause.)

Complaint.

The complaint of the plaintiff shows to the Court:

That at all the times hereinafter stated, defendant was, and now is, a corporation, duly created, organized and existing under and by virtue of the laws of the State of Minnesota.

That in the month of March, 1893, one Jerry Hickey, then a citizen of the United States, and a resident of the State of Minnesota, and otherwise possessing all the necessary legal qualifications as a homestead claimant under the laws of the United States, entered upon, took possession of, and made homestead settlement and improvements upon a tract of land described as follows, to-wit:

Lot twelve (12), Section three (3), and lots nine (9), ten
3 (10), fourteen (14) and fifteen (15), of Section four (4), Township sixty (60), Range Twenty-four (24), State of Minnesota.

That said land was then vacant, unsurveyed public land of the United States, subject to such settlement, and that said Hickey con-

tinued in possession and use of said tract of land as a homestead by residing upon, improving, cultivating and otherwise using it for his exclusive use as a homestead, and fully complying with the requirements of a homestead claimant by the homestead laws of the United States as to residence, cultivation, improvements, etc., up to and until his death, in the month of March, 1897.

That the plat of the township in which this land is, viz.: Township sixty (60), Range twenty-four (24), was officially filed in the local land office at Duluth, Minnesota, on July 22, 1896, and the land therein, on said day, became open for entry under said homestead laws.

That on said 22nd day of July, 1896, said Hickey being then a qualified homestead claimant, as aforesaid, presented for filing and tendered to the Register and Receiver of the local land office at Duluth, Minnesota, within which land district said tract was situate, a proper legal homestead application for all the land above described, accompanied by all required affidavits and proofs of his cultivation and rights as a homestead claimant, alleging in support of said application that he made settlement thereon March 22, 1893, thereby declaring that the land applied for was that claimed by him from
date of settlement, and he also at said time and place tendered
4 to said Register and Receiver of the local land office the
regular fees and commissions. The land included in said application was less than one hundred and sixty (160) acres, and in one compact body.

That the said Register and Receiver, having received and filed said homestead application, as required by law, thereafter, on the same day, unlawfully and illegally rejected said application and refused to permit said Hickey to enter said land under the homestead laws, alleging as grounds for said rejection that said homestead application conflicted with certain selections made by the defendant company, and the said Hickey then appealed to the Commissioner of the United States General Land Office from said decision of the said Register and Receiver of the local land office of Duluth, Minnesota.

That on August 5, 1892, the Congress of the United States passed an act wherein and whereby the defendant company, in lieu of its relinquishment of other lands, to which it had been held by the courts to be entitled, but which the United States had disposed of as public lands in disregard of the railroad company's rights, was granted the right to select "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey which has or shall be made of the United States, not reserved, and to which no adverse right or claims shall have attached
or have been initiated at the time of the making of such
5 selections, lying within any state into or through which the
railroad owned by said railway company runs to the extent of the lands so relinquished and released."

The third section of this Act provided, among other things, that in case the tract so selected shall at the time of the selection be unsurveyed, the list filed by the company at the local land office

shall describe such tract in such manner as to designate the same with reasonable certainty, and within three months after the land, including such tract, shall have been surveyed and the plats filed in the local land office, a new selection list shall be filed by said company describing such tract according to such survey, and in case such tract as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to produce such conformity.

That pretending to act under and pursuant to said Act of Congress, the defendant company, on December 31, 1895, made, and wrongfully, unlawfully and illegally filed in the local land office at Duluth, Minnesota, an application to select a tract of land in Itasca County, Minnesota, which included the aforesaid lot twelve (12) of Section three (3) and lots nine (9) and ten (10), of Section four (4), Township sixty (60), Range twenty-four (24); that at the time of said selection the said land was unsurveyed, and at said time an adverse claim and right had theretofore attached and had been
6 initiated to said land so selected, to-wit: The prior homestead settlement and claim made thereon by said Jerry Hickey, who claimed all of said land under and by virtue of the Act of Congress of May 14, 1880 (21 Stat. 140).

That on July 22, 1896, the defendant company tendered and proffered for filing in the local land office at Duluth, Minnesota, its supplemental list of selections, adjusting its previous selections of December 31, 1895, to the lines of government survey, which supplemental selection was rejected as to lot twelve (12) of Section three (3) and lots nine and ten (9) and (10) of Section four (4), Township sixty (60), Range twenty-four (24), because it conflicted with the pending homestead application made by said Hickey, and the defendant company thereupon appealed to the General Land Office from the action of the local land officers in rejecting its said application.

That on March 25, 1897, said Jerry Hickey, then a resident on the land in controversy and while said case was pending on appeal in the General Land Office, died, leaving as his sole surviving heir his mother, one Bridget Hickey, then residing at Calais, Maine.

That thereafter, on October 12, 1901, in a proceeding had before the Land Commissioner of the General Land Office on said appeal, the Honorable Commissioner of the General Land Office sent said matter to the Register and Receiver of the local land office at Duluth, Minnesota, to take testimony in said case to determine whether the applicant, Jerry Hickey, had established a settlement on said
7 land in controversy prior to the time the defendant company made its application therefor, and that thereafter testimony was taken, and said matter was heard in said local land office, and on April 11, 1902, the said Register and Receiver filed their decision in said case wherein they found as facts: That said Jerry Hickey had settled on the said land long prior to the filing of the township plats, and that his settlement claim was maintained up to the time of his death; that he duly cultivated and improved said land, in conformity

with the homestead laws of the United States government, and did all things necessary and required of him under said law, but that his improvements were confined to lot fifteen (15) of Section four (4) and that his claim must be restricted to the land within the technical quarter section in which said lot fifteen (15) fell. His claim, therefore, was recognized by said Register and Receiver only as to lots fourteen (14) and fifteen (15) of said Section four (4) and rejected as to the other lots.

Appeal was then taken by said Bridget Hickey, as sole heir of said Jerry Hickey, deceased, to the General Land Office at Washington, D. C., from the action of the local land officers in rejecting said application, and on August 12, 1902, the Commissioner of the General Land Office affirmed the decision of the Register and Receiver of the local land office, and an appeal was then taken to the Secretary of the Interior for final adjudication.

That the said Secretary of the Interior, on February 11,
8 1903, made and filed his decision in said case upon said appeal, wherein he found as facts and held: "That the defendant company was restricted in its selections of land to which no adverse right or claim had attached or had been initiated at the time of the making of such selections; that the said Jerry Hickey had, prior to the selection of the land by the defendant company initiated and made claim under the homestead laws to the entire tract of land embraced in his application; that such right was duly and timely asserted, and was a bar to the selection of said land by the defendant company, under the Act of August 5, 1892."

The Honorable Secretary of the Interior further ordered that the said action of the General Land Office be reversed, and that upon completion of said entry of said land by the heirs of said Hickey, the selection made by the defendant company to the land in question herein should be cancelled. (Copy of said decision is hereto attached, marked Exhibit A, and made a part of said complaint.)

In pursuance and in accordance with said decision, the said Bridget Hickey, who was then and there sole heir of said Jerry Hickey, deceased, and otherwise possessing the necessary qualifications required by law on June 4, 1903, completed the said entry before made by said Jerry Hickey for all the said tract of land embraced in his said application, and including the land in controversy. That on said day she filed in the local land office at Duluth, Minnesota, homestead application No. 18845 and all the other necessary affidavits, as required by law and the order of
9 the Land Department of the United States, paid her filing fees and commissions demanded of her, etc., whereupon the said entry was allowed by the Register and Receiver of the local land office at Duluth, Minnesota, and at said time and place there was issued to her Receiver's duplicate receipt No. 18845, the said Receiver's duplicate receipt being for lot twelve (12), Section three (3), and lots nine (9) and ten (10), fourteen (14) and fifteen (15) of Section four (4), Township sixty (60), Range twenty-four (24), which receipt was in words and figures as follows, to-wit:

"Receiver's Duplicate Receipt.

No. 18845. Application No. 18845.

Homestead.

RECEIVER'S OFFICE, DULUTH, MINN., *June 4th*, 1903.

Received of Bridget Hickey, for the heirs of Jerry Hickey, deceased, the sum of fourteen dollars no cents, being the amount of fees and compensation of Register and Receiver for the entry of lot 12, Section 3, lots 9, 10, 14 and 15 of Section 4, in Township 60 N. of Range 24 W, 4th P. M., under Section 2290 Revised Statutes of the United States.

J. N. SMITH, *Receiver.*"

That under the law and the ruling of the Land Department said decision of the Secretary of the Interior of February 11, 1903, became final and conclusive against the defendant company as to the land in controversy immediately upon the completion of the entry by the said Bridget Hickey, which was made on June 4, 1903, as aforesaid.

10 That under the laws of the United States the defendant had no right, claim or interest under its said pretended selection.

That on or about the 1st day of July, 1903, the records, etc., of the said Township sixty (60), Range twenty-four (24), were changed to the local land office at Cass Lake, Minnesota, that office having been created a short time previous; that on July 2, 1903, said Bridget Hickey, as the sole heir of said Jerry Hickey, deceased filed in the local land office at Cass Lake, Minnesota, her written relinquishment, wherein and whereby she relinquished to the United States government all her claim, right, title and interest in and to all the land embraced in her said application and in the application of said Jerry Hickey, deceased. That the land then and there became government land and a part of the public domain, and subject to entry by the first legal applicant.

That on said July 2, 1903, and subsequent to the filing of said relinquishment, and while the said lot twelve (12) of Section three (3), and lots nine (9), ten (10), fourteen (14) and fifteen (15) of Section four (4), Township sixty (60), Range twenty-four (24), were still government land and a part of the public domain and subject to entry under the laws of the United States government, and especially under the timber and stone act of June 3, 1878, (20 Stat. 89) said plaintiff who was then a citizen of the United States and a resident of the State of Minnesota, and otherwise possessing all and every qualification necessary to enter said land under

11 the timber and stone act, did then and there, on said day, make cash entry No. 154, under the timber and stone act of June 3, 1878 (20 Stat. 89) for said lot twelve (12), Section three (3), and lots nine (9), ten (10), fourteen (14) and fifteen (15),

of Section four (4), Township sixty (60), Range twenty-four (24) by filing with the Register and Receiver of said local land office at Cass Lake, Minnesota, his application and other affidavits, etc., required under the said act of June 3, 1878. That at the said time and place he paid the necessary filing fees and commissions demanded of him by said Register and Receiver.

That thereafter, on the 12th day of October, 1903, upon due notice given by said Register and Receiver, said plaintiff duly made and submitted his final proof before said Register and Receiver at Cass Lake, Minnesota, under and in support of his said timber and stone cash entry and in conformity with the laws of the United States government relating to proof under said timber and stone act. That at said time and place he paid to the United States government, through said Register and Receiver at the local land office at Cass Lake, Minnesota, the sum of four hundred and seven dollars ($407), the same being in full payment for the amount due to said United States government for said land under said timber and stone act. That at the same time and place he paid to said Register and Receiver the money demanded by them as their fees and commissions.

12 That on October 20, 1903, the said plaintiff's final proof in support of said timber and stone entry was duly accepted, and Receiver's final cash certificate No. 154 was duly issued to said plaintiff for said lot twelve (12), Section three (3), and lots nine (9), ten (10), fourteen (14) and fifteen (15) of Section four (4), Township sixty (60), Range twenty-four (24), which certificate was filed for record and duly recorded in the office of the Register of Deeds of Itasca County, on November 5, 1903, at nine o'clock A. M., in Book 23 of Miscellaneous Records at page 322. That said final certificate is in words and figures as follows, to-wit:

"No. 154.

RECEIVER'S OFFICE, AT CASS LAKE, MINN., *Oct.* 20, 1903.

Received from John R. Donohue, of Ramsey County, Minn., the sum of four hundred and seven dollars and no cents, being in full for lot 12, Section 3, lots 9, 10, 14 and 15 of Section 4, in Township No. 60 N. of Range No. 24 W. 4th P. M., containing 162 80-100 acres at $2.50/00 per acre.

E. S. OAKLEY, *Receiver.*"

$1.50/100 testimony fee received. Number of written words 1,000, rate per 100 words 15 cents.
$10.00 for T. & S. No. 3 filed July 2, 1903."

That said plaintiff has in all things complied with all the laws of the United States government and the rules and regulations of the Land Department relative to obtaining title to said land under the said timber and stone act, and a patent to said land should be issued to him.

13 That by reason of the aforesaid your plaintiff is the equitable owner of all said land, and he is entitled to the legal title thereof.

That thereafter and on or about March 25, 1904, the United States General Land Office unlawfully, wrongfully, arbitrarily and illegally, and without notice and without a hearing, suspended the said timber and stone entry of the plaintiff, and wrongfully, arbitrarily and illegally ordered and directed the local land offices to notify said defendant company to perfect its selection as to said lot twelve (12) of Section three (3) and lots nine (9) and ten (10) of Section four (4), Township sixty (60), Range twenty-four (24). That thereafter said defendant company pretended to perfect its said selections. That on or about July 22, 1904, the United States General Land Office made an order upon said selections, wherein it was held in effect that the said defendant company, having perfected its selections to the land in controversy, the timber and stone cash entry made by plaintiff as to said lot twelve (12) of Section three (3) and lots nine (9) and ten (10) of Section four (4), Township sixty (60), Range twenty-four (24) was held for cancellation.

That thereafter in due time said plaintiff appealed from said Commissioner's decision and order holding said entry for cancellation to the Secretary of the Interior, in strict accordance with the rules of practice of the Land Department relating to appeals in such cases.

14 That the Commissioner of the General Land Office in due time allowed and forwarded said plaintiff's appeal, together with the records, to the Secretary of the Interior, who, on December 16, 1904, examined said matter on said appeal, and filed his decision in said case and affirmed the Commissioner's decision, thereby sustaining the defendant company's selection and disallowing said plaintiff's entry as to the land in controversy. (A copy of said decision is hereto attached and marked Exhibit B, and made a part of said complaint.)

That in due time and in strict accordance with the rules of practice of the Land Department, said plaintiff duly filed his motion for the review of said Secretary's decision aforesaid, which motion, on March 17, 1905, was by the Secretary of the Interior overruled and disallowed, and his said decision of December 16, 1904, was affirmed. (A copy of said decision is hereto attached marked Exhibit C, and made a part of said complaint.)

That prior to the commencement of this action, and on or about June 30, 1905, a patent from the United States government for the land in controversy was fraudulently, unlawfully, arbitrarily and illegally issued to the defendant company, conveying the legal title of said land to it. That said patent was so issued by and through a demonstrable mistake of fact and law on the part of the officials of the government. Plaintiff avers and alleges that the Secretary of the Interior, the Commissioner of the General Land Office and the Register and Receiver of the local land office, each and all committed manifest wrong and error in their said decisions in allow-

15 ing said defendant company to file and perfect its selections to said land, and in canceling the timber and stone entry

of plaintiff, and in afterwards issuing to defendant a patent for said land inasmuch that the defendant was barred from selecting said land by reason of the attached homestead claim of said Jerry Hickey, deceased, and for the further reason that when Bridget Hickey, as the sole heir of said Jerry Hickey, deceased, released her right, title and interest to the United States government, the said land then and there became government land and a part of the public domain and was subject to entry by the first legal applicant, who in this case is said plaintiff, and who has in all things complied with the law and the statutes governing his said entry, and who is now the equitable owner of said land and entitled to the legal title thereof.

That said officials misconstrued, misinterpreted and misapplied the laws of the United States and the facts in the case in allowing the said defendant company to file and perfect its selections of said land after a claim and right was initiated and had become attached under the homestead laws, and in disallowing plaintiff's entry in issuing to said defendant a patent for said land. That through said mistake of the said officials of the United States government, the aforesaid patent was wrongfully, fraudulently, arbitrarily and illegally issued to said defendant, whereby plaintiff was and is injured, damaged and illegally deprived of his lawful rights and
16 claims to said land of which he is the equitable owner and entitled to the legal title thereof.

That said plaintiff has been irreparably damaged by the issuance of said patent and he has no adequate remedy at law.

Wherefore, plaintiff prays the decree of this Court, First, that he is the owner of said premises; Second, that the defendant has no right, title or interest in or to said premises; Third, that said defendant holds the legal title from the United States government of said premises in trust for plaintiff; fourth, that said defendant executed a deed conveying all its rights, interest and title in and to said premises to plaintiff, and that upon its failure so to do, the decree of the Court stand as such conveyance; fifth, for such other and further relief as to the Court may seem just and meet; Sixth, for the costs and disbursements of this action.

J. R. DONOHUE,
Attorney for Plaintiff, St. Paul, Minn.

(Duly verified.)

(Exhibits A, B, C—Decisions of Secretary of Interior not printed here. Will be found printed in full in stipulation of facts.)

17 (Title of Cause.)

Answer.

The defendant above named for its answer to the complaint of the plaintiff herein respectfully shows to the Court:

Defendant admits that it is and at the times mentioned in the complaint was a corporation organized and existing under the laws of the State of Minnesota.

Defendant admits that during the year 1893 Jerry Hickey entered upon, took possession of and made settlement and improvements upon a tract of land in unsurveyed Township 60 North, Range 24 West, State of Minnesota; that said land was then vacant unsurveyed public land of the United States; that said Hickey continued in the possession and use of the tract settled upon and taken possession of by him; that he resided upon and improved same until his death; that he was a citizen of the United States and possessed the legal qualifications as a homestead claimant under the laws of the United States, and that he died in the month of March, 1897. But defendant denies that said Hickey ever entered upon, or took possession of, or cultivated, or made homestead settlement or improvements upon lot 12 of Section 3 or lots 9 and 10 of Section 4, Township 60 North, Range 24 West, or that he ever in any manner whatsoever gave notice of or indicated an intention to claim said lands under the homestead laws of the United States or otherwise.

18 Defendant admits that the plat of the official survey of said Township 60 North, Range 24 West, was filed in the United States Land Office at Duluth, Minnesota, on July 22, 1896; that on said day said Hickey presented to the Land Officers for said Land District at Duluth, Minnesota, an application to enter under the homestead law the lands described in the complaint, to-wit: Lot 12 of Section 3 and Lots 9, 10, 14 and 15 of Section 4, Township 60 North, Range 24 West, State of Minnesota; that in said application he alleged and claimed that he settled on said land on March 22, 1893; that said application was rejected by said Land Officers for the reason that the same conflicted with the selection thereof made by this defendant and that said Hickey appealed from said decision of said Land Officers to the Commissioner of the General Land Office.

Defendant admits that in and by the Act of Congress approved August 5, 1892, mentioned in the complaint herein, it is enacted substantially as set forth in said complaint.

Defendant admits that on December 31, 1895, it filed in the United States District Land Office at Duluth, Minnesota, an application to select and did select certain lands in unsurveyed Township 60 North, Range 24 West, under said Act of Congress of August 5, 1892; that it duly paid to the Land Officers for said Land District the legal fees for such selection, and that a part of the lands so applied for and selected when surveyed were found to be

19 lot 12 of Section 3 and lots 9 and 10 of Section 4, Township 60 North, Range 24 West. Defendant alleges that said application was duly accepted and filed by said Land Officers and its selection of said lands duly allowed and approved. Defendant denies that at the time of its said selection any adverse right or claim had attached or been initiated to the land so selected by it.

Defendant admits that on July 22, 1896, it duly tendered to the District Land Officers at Duluth, Minnesota, its supplemental list of selection adjusting its previous selection to the lines of the government survey; that said supplemental list was rejected by said Land Officers as to lot 12 of Section 3 and lots 9 and 10 of Section 4, Town-

ship 60 North, Range 24 West, because it conflicted with the homestead application of said H-ckey, and that this defendant thereupon appealed to the Commissioner of the General Land Office from said rejection.

Defendant admits that Bridget Hickey is and was the sole heir of said Jerry Hickey and that she resides at Calais, Maine.

Defendant admits that on or about October 12, 1901, the Commissioner of the General Land Office directed the District Land Officers at Duluth to take testimony in said case to determine whether said Jerry Hickey had established a settlement on said Lot 12 of Section 3 and said Lots 9 and 10 of Section 4 prior to the time this defendant made its application to select the same; that testimony was duly taken in the matter, and that on April
20 11, 1902, the District Land Officers filed their decision therein wherein and whereby they rejected the application of said Jerry Hickey to make homestead entry of said land.

Defendant denies that said District Land Officers found as facts that said Jerry Hickey had settled on said lot 12 of Section 3 or on said lots 9 and 10 of Section 4 prior to this defendant's selection thereof or at any time whatsoever. But, on the contrary, defendant alleges that said District Land Officers found as facts that said Jerry Hickey's settlement, residence, cultivation and improvements were located on and confined in lot 15 of said Section 4; that he never at any time made any improvements whatever on said lot 12 of Section 3 or on said lots 9 and 10 of Section 4, and that he never in any manner posted notice of intention to claim said lots last described or erected any buildings or other improvements thereon or blazed lines on or around the same.

Defendant admits that the said District Land Officers rejected the application of said Hickey upon the ground that said lots 14 and 15 of Section 4 were not in the same quarter section as lots 9 and 10 of Section 4 or lot 12 of Section 3, and that his claim was in law restricted to the quarter section in which his settlement, cultivation and improvements were situated.

Defendant admits that thereafter the said Bridget Hickey, as heir of said Jerry Hickey, duly appealed to the Commissioner of the General Land Office from the action of the District Land
21 Officers in rejecting said application, and that on or about August 12, 1902, the decision of said District Land Officers was affirmed by said Commissioner of the General Land Office.

Defendant admits that said Bridget Hickey duly appealed to the Secretary of the Interior from said decision of the Commissioner of the General Land Office; that on or about February 11, 1903, said decision was reversed by said Secretary of the Interior, and that the Secretary ordered and directed that upon the completion of entry of said land by the heirs of said Jerry Hickey the selection thereof by this defendant be canceled. Defendant alleges that the Secretary of the Interior in his said decision approved, affirmed and adopted the findings of facts made by the District Land Officers in their decision hereinbefore set forth and that he reversed the decision of the Commissioner of the General Land Office solely upon

the ground that the principle of law under which a settlement claim upon the public lands is, as against an adverse claim, restricted to the technical quarter section in which the settler's improvements are shown to be, applies only to cases where the adverse claim is asserted under the settlement laws.

Defendant admits that on June 4, 1903, the said Bridget Hickey filed in the District Land Office at Duluth, Minnesota, homestead application No. 18845; that she made the preliminary homestead affidavit required by law and the regulations of the Land Department of the United States; that she paid the filing fees and commissions, and that thereupon she was allowed to make and
22 did make homestead entry No. 18845 for lot 12 of Section 3 and lots 9, 10, 14 and 15 of Section 4, Township 60 North, Range 24 West. But the defendant denies that on June 4, 1903, or at any time whatsoever, said Bridget Hickey, as heir of Jerry Hickey or otherwise, ever completed the entry applied for by said Jerry Hickey, or that she ever made the affidavits or proofs required by the homestead law or ever did anything in the matter other than to make the preliminary affidavit and what is known as the original or preliminary homestead entry.

Defendant admits that on or about the 1st day of July, 1903, the land described in the complaint was transferred from the Duluth Land District to the Cass Lake Land District in the State of Minnesota, and that on July 2, 1903, said Bridget Hickey filed in the District Land Office at Cass Lake, Minnesota, her written relinquishment wherein she released and relinquished to the United States all her claim, right, title and interest in and to the land embraced in the application of said Jerry Hickey and in the original homestead entry made by her as hereinbefore stated.

Defendant admits that on or about the 2nd day of July, 1903, John R. Donohue, the plaintiff herein, presented to the District Land Officers at Cass Lake, Minnesota, his application to make entry of said lots under the timber and stone act of congress of June 3, 1878; that thereafter and on the 12th day of October, 1903, said plaintiff made and submitted his proofs under said Act to the said District Land Officers; that at the same time he tendered and
23 paid to the Receiver of said District Land Office at Cass Lake the purchase price of said land under said Act; that he was thereupon permitted to and did make entry thereof under said timber and stone act, and that the said plaintiff was a citizen of the United States and a resident of the State of Minnesota and possessed the qualifications necessary to entitle him to enter land under said timber and stone law. But defendant alleges that said lands were not public lands of the United States at the time plaintiff applied to enter the same, or at the time his said entry thereof was allowed by said District Land Officers; that said lands were at all of said times and for many years prior thereto reserved, appropriated and severed from the public lands by this defendant's selection thereof under said act of August 5, 1892; that the action of said District Land Office allowing plaintiff to make entry of said lands under the

timber and stone law was contrary to law and in direct violation of the order of the Secretary of the Interior contained in his said decision of February 11, 1903, and that plaintiff's said entry was thereafter canceled and annulled by the Commissioner of the General Land Office and the Secretary of the Interior for conflict with this defendant's selection of said lands.

Defendant denies that the plaintiff is the equitable owner of the land selected by it as hereinbefore stated or that he has any right, title or interest therein.

24 Defendant admits that thereafter and on or about the 25th day of March, 1904, the Commissioner of the General Land Office directed the District Land Officers at Cass Lake, Minnesota, to notify this defendant to perfect its selection of said lot 12 of Section 3 and said lots 9 and 10 of Section 4, Township 60 North, Range 24 West, and that thereafter and within the time specified and allowed by the said Commissioner this defendant duly perfected its selection of said lots.

Defendant admits that on or about July 22, 1904, plaintiff's timber and stone entry of said land was held for cancellation by the Commissioner of the General Land Office; that the plaintiff appealed to the Secretary of the Interior from the decision of said Commissioner, and that said decision was on or about December 16, 1904, affirmed by the Secretary of the Interior; that thereafter and within the time allowed by the rules of practice of the Department of the Interior the plaintiff herein filed with the Secretary of the Interior his motion for the review of said secretary's decision of December 16, 1904, and that said motion was by the Secretary of the Interior overruled and denied on March 17, 1905. Defendant alleges that thereafter and under and pursuant to the said decisions the said timber cash entry of plaintiff was duly canceled on the files and records of the Land Department by the Commissioner of the General Land Office.

Defendant admits that on or about June 30, 1905, a patent of the United States was issued to this defendant conveying to it

25 the said lot 12 of Section 3 and the said lots 9 and 10 of Section 4, Township 60 North, Range 24 West, and defendant alleges that by reason of its selection of the said lands and of the said patent thereof, it is the owner in fee simple of the said lands.

Defendant denies each and every allegation, matter or thing in said complaint contained not hereinbefore admitted, qualified or more specifically denied.

Wherefore defendant demands judgment, that this action be dismissed and for its costs and disbursements herein.

THOS. R. BENTON,
Attorney for Defendant.

St. Paul, Minn., September 28, 1905.
(Duly verified.)

(Title of Cause.)

Reply.

Now comes the plaintiff and for his reply to the answer of said defendant herein respectfully shows to the court:

Plaintiff denies each and every allegation, matter and thing and each and every part thereof in said answer contained except wherein the said answer admits the complaint allegations.

Wherefore, plaintiff demands judgment, as prayed for in his complaint.

J. R. DONOHUE,
Attorney for Plaintiff, St. Paul, Minn.

(Duly verified.)

26 (Title of Cause.)

Stipulation of Facts.

It is hereby stipulated and agreed between the plaintiff and the defendant herein that, for the purpose of this action, records and papers are received in evidence and are a part of the proofs herein and facts are admitted, as follows:

1. During the year 1893 Jerry Hickey entered upon, took possession of and made settlement and improvement upon a tract of unsurveyed land which on survey was found to be in Township 60 North Range 24 West, in the County of Itasca, State of Minnesota. Said land was then vacant unsurveyed public land of the United States. Said Jerry Hickey continued in the possession and occupation of the tract so settled upon by him, erected a dwelling house thereon and resided upon, cultivated and improved said tract from the time of his settlement until his death in the month of March, 1897. Said Jerry Hickey was a citizen of the United States and possessed the qualifications prescribed by the homestead laws of the United States.

2. On December 31, 1895, the St. Paul, Minneapolis & Manitoba Railway Company, the defendant herein, filed in the United States District Land Office at Duluth, Minnesota, its application to select certain unsurveyed lands in said unsurveyed Township 60 North, Range 24 West, under the provisions of the Act of Congress
27 approved August 5, 1892, entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota." Said company duly paid to the Receiver of said Land District the legal fees for such selection and its application was accepted and filed by said District Land Officers and noted on their records.

3. The official plat of the United States survey of said Township 60 North, Range 24 West, was filed in the United States Land Office at Duluth, Minnesota, on July 22, 1896. On said day said Jerry Hickey presented to the Land Officers for said Land District an

application to enter the following described lands, to-wit: Lot 12 of Sec. 3, and Lots 9, 10, 14 and 15 of Sec. 4, Twp. 60 N., R. 24 W., under the homestead laws of the United States. In his said application said Jerry Hickey alleged and claimed that he settled upon the above described tracts of land on March 22, 1893. The District Land Officers rejected Hickey's said application for the reason that the same in part conflicted with the application to select made by the St. Paul, Minneapolis and Manitoba Railway Company, the defendant herein. The said Hickey thereupon, and within the time allowed for that purpose, duly appealed from the decision of said District Land Officers to the Commissioner of the General Land Office.

4. When said Twp. 60 N., R. 24 W. was surveyed it was found that said lot 12 of Sec. 3 and lots 9 and 10 of Sec. 4, Twp.
28 60 N., R. 24 W. were a part of the lands included in the application to select of the St. Paul, Minneapolis & Manitoba Railway Company filed in the District Land Office at Duluth, Minnesota, on December 31, 1895, as hereinbefore stated. On July 22, 1896 said St. Paul, Minneapolis & Manitoba Railway Company filed in the District Land Office at Duluth, Minnesota, its supplemental list adjusting its application or selection of December 31, 1895, to the lines of the government survey. Said supplemental list was rejected by said District Land Officers as to lot 12 of Sec. 3, and lots 9 and 10 of Sec. 4, Twp. 60 N., R. 24 W., because the same conflicted with the homestead application of said Jerry Hickey hereinbefore mentioned. Said railway company thereupon, and within the time allowed for that purpose, duly appealed from the decision of said District Land Officers to the Commissioner of the General Land Office.

5. Said Jerry Hickey died some time in the month of March, 1897, leaving as his sole heir his mother, Bridget Hickey, who was a citizen of the United States and resided at Calais, Maine.

6. On October 12, 1901, the Commissioner of the General Land Office directed the District Land Officers at Duluth, Minnesota, to order a hearing for the purpose of taking testimony to determine whether said Jerry Hickey had made a settlement and established his residence under the homestead laws of the United States on said lot 12 of Sec. 3, and said lots 9, 10, 14 and 15 of Sec. 4, Twp. 60
N., R. 24 W., prior to and at the time of the filing of the
29 application of the St. Paul, Minneapolis & Manitoba Railway Company to select the same. Testimony was duly taken in said proceedings after due notice to said Bridget Hickey and said Railway Company, and on April 11, 1902, the District Land Officers filed their decision. The following is a true and correct copy of the said decision of District Land Officers:

United States Land Office, Duluth, Minn.

THE HEIRS OF JERRY HICKEY, Plaintiffs,
vs.
ST. PAUL, M. & M. RY. CO., Defendant.

Lot 12 of Sec. 3, Lots 9 and 10, Sec. 4, T. 60 N., R. 24 W.

On December 31, 1895, the defendant herein made application to select the land described in the caption, with other lands, under its list No. 5, by virtue of the Act of August 5, 1892. This application seems to have been rejected by this office for conflict with certain settlement claims of record here. From this action the company appealed. The plat of this township was filed in this office on July 22, 1896, and thereupon the lands therein became open to entry. On that day Jerry Hickey made homestead application for the
30 lands described in the caption, and also for Lots 14 and 15 of Section 4, said township, claiming settlement on all of said lands on March 27, 1893. The homestead application and affidavit of said Hickey has been lost or mislaid, but we proceed in the matter on the assumption that the application and affidavit were in due form and properly alleged the prior settlement, as no doubt they did do. By letter of October 12, 1901, the Hon. Commissioner of the General Land Office ordered a hearing between the parties named in the caption, for the purpose of determining whether or not the homestead applicant, Hickey, had made a settlement on the lands in controversy prior to the time when the application of the defendant railroad company was made, through its list No. 5, for the lands in conflict. Pursuant to these instructions, on October 18, 1901, this office did order a hearing, fixing 10 A. M., November 29, 1901, before the Clerk of Court at Grand Rapids, Minnesota—which is near the land in controversy—as a time and place when and where evidence might be taken from the conflicting parties in support of their respective claims, and fixing December 5, 1901, at 10 A. M., at this office for final hearing.

On November 29, 1901, J. R. Donohue, attorney, appeared for the heirs of Hickey before the Clerk of Court at Grand Rapids, and Thomas R. Benton appeared as attorney for the defendant railroad company. It appears without question that the applicant, Hickey, is dead, and that he died in the spring of 1897; and it also
31 appears without question that the sole surviving heir is his mother, Bridget Hickey, of Calais, County of Washington, State of Maine.

The precise question at issue in this case, in so far as the rights of the defendant railroad company are concerned, is whether when on December 30, 1895, when this land was unsurveyed, it applied therefor, with other lands, under its List No. 5, under an act by which it was entitled to locate unsurveyed lands, Hickey had given such notice of his claim under the Act of May 14, 1880, to the lands which the railroad claimed as would advise it that he claimed said lands. If these lands in conflict were in the same technical quarter section

in which Hickey's improvements were the matter would not admit a question; the rights of the company would be subject to his, but the fact is that Lot 12 of Section 3 and Lots 9 and 10 of Section 4 are entirely outside of the technical quarter section and government subdivision upon which Hickey had his improvements, to-wit: his house, his well and his clearing. The record will be searched in vain for any evidence showing, or tending to show, that Hickey had made any improvements whatever on the descriptions of land just set out. No notice appears to have been posted, buildings erected nor lines blazed on or around said tracts.

The rule seems to be well established that where notice is given by a settlement on unsurveyed portions of the public domain, the rights of the settler will not extend beyond the technical quarter section in which his improvements are placed. The rule
32 seems to be eminently just and equitable. If a settler desires to pass outside of any given quarter section he must show that intention by some signs, which are very easily given. It is possible that this applicant, Hickey, did all these things, but as stated, the burden of proof is on his heirs to show that it was done and no such showing has been made.

We will base this decision on the case of

Warren *v.* Gibson, 29 L. D. 197; and
Coffron *v.* Morrison.

decided by the Commissioner of the General Land Office, by letter "H" of March 20, 1902, to this office.

We are of the opinion that on the record in this case the claim of the heirs of Hickey to Lot 12 of Section 3 and Lots 9 and 10 of Section 4, cannot be sustained, and we recommend that the homestead application be rejected to that extent, and that the railroad selection of said lots, if otherwise valid except in so far as it conflicts with Hickey, be allowed, and that Hickey's application for Lots 14 and 15 of Section 4 be allowed.

Notice of this decision will be given to the attorney for Hickey's heirs, and thirty days allowed for appeal herefrom.

Dated April 11, 1902.

WM. E. CULKIN, *Register.*
J. M. SMITH, *Receiver.*

33 7. Thereafter and within the time allowed for that purpose, Bridget Hickey, as heir of Jerry Hickey, duly appealed to the Commissioner of the General Land Office from the decision of said District Land Officers and on August 16, 1902, the decision of said District Land Officers was affirmed by the Commissioner of the General Land Office. The following is a true and correct copy of said decision of the Commissioner of the General Land Office:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY
vs.
JERRY HICKEY ET AL.

AUGUST 16, 1902.

Lots 7, 9, 10, 11 & 12, Sec. 3, Lots 9, 10, 14 & 15, Sec. 4, and the N. W. ¼ Sec. 9, T. 60 N., R. 24 W., Minnesota.

Register and Receiver, Duluth, Minnesota.

SIRS: On December 31, 1895, the St. Paul, Minneapolis and Manitoba Railway Company made application, per list No. 5, to
34 select among other lands, under the act of August 5, 1892, certain tracts that, since survey, are designated as Lots 7, 10, 11 and 12, Sec. 3, and Lots 9 and 10, Sec. 4, and the W. ½ N. W. ¼, Sec. 9, described township and range. The list was, at date of filing, allowed by the local officers. Plat of survey of the township was filed in the local office, July 22, 1896, on which date the company filed with the register and receiver, Selection List No. 7, supplemental to aforesaid List No. 5, for the purpose of adjusting the selection made of these tracts to the lines of the survey.

This supplemental list was rejected by the local officers as to the lands applied for by the company (before designated), by reason of conflict with certain adverse claims, which will be indicated hereinafter.

On December 7, 1896, the company filed amended list No. 7, which was designed to omit the tracts in conflict; and at the same time filed appeals as to Lot 12, Sec. 3, and Lots 9 and 10, Sec. 4, involved in a homestead application by Jerry Hickey, and Lots 7, 10 and 11, Sec. 3, embraced in a homestead application by Peter McKenna.

It having been discovered by the local officers that the company had, in this list, erroneously included Lot 12 of Sec. 3, and the W. ½ N. W. ¼, Sec. 9, and the company through its attorney, Thomas R. Benton, Esq., having by letter to the register and receiver December 19, 1896, assented to the rejection of the lat-er tract, if found not subject to selection, these tracts were rejected by your office, December 22, 1896.

35 On January 2, 1897, a new list (No. 7) was filed by the company, entirely free from conflict, and the same was approved by the local officers, January 2, 1897, as amendatory of the original list (No. 5) filed December 31, 1895, *supra*.

January 6, 1897, the register transmitted appeals by the company, from the rejection by the local officers of its applications to select lands involved in the homestead application of Jerry Hickey, and that of Peter McKenna, and in the pre-emption claim of William E. Myers.

By letter "F" of December 28, 1899, you were advised that the applications of Hickey and McKenna had not been received by this

office, and you were at the same time directed to forward the papers if in the files of your office.

January 16, 1900, you reported that your tract books showed that on July 23, 1896, you reported that your tract books showed that on July 22, 1896, Jerry Hickey filed homestead application for the described Lot 12, Sec. 3, and Lots 9, 10, 14 and 15, Sec. 4, alleging settlement March 27, 1893; and that on July 23, 1896, Peter McKenna filed homestead application for Lots 7, 9, 10 and 11, Sec. 3, alleging settlement March 26, 1893.

You, at the same time, reported that your records showed that both applications had been rejected for conflict with the claim of the said railway company, but that the application could not be found in your files.

January 14, 1901, in response to letter "F" of December 28, 1899, calling for report, you transmitted McKenna's homestead
36 application for the described Lots 7, 9, 10 and 11 of Sec. 3, filed October 5, 1900, also McKenna's withdrawal of said application, so far as it relates to Lots 7, 10 and 11, thereby leaving Lot 9 intact.

The claim of William E. Myers, above referred to, covers the N. W. ¼, Sec. 9, T. 60 N., R. 24 W., as shown by pre-emption cash entry No. 14510, based on D. S. No. 6097, filed February 19, 1897.

Certain affidavits filed in this office September 30 and October 9, 1901, by J. B. Donohue, Esq., of Grand Rapids, Minnesota, an attorney for the heirs of Jerry Hickey, deceased, showed that the said Hickey had settled in 1893 upon Lot No. 12, Sec. 3, and Lots 9, 10, 14 and 15, Sec. 4, described township and range; that he made homestead application in 1896, for said tracts; and that he had resided thereon until the time of his death, to-wit: March 25, 1897.

As these affidavits were *ex parte*, and in view of the fact that no application had been found showing Hickey's claim, you were directed by letter "F" of October 12, 1901, to order a hearing as to said party.

June 3, 1902, you transmitted the testimony taken at the hearing, together with your decision rendered April 11, 1902, in favor of the railway company as to Lot 12, Sec. 3, and Lots 9 and 10, Sec. 4. As to Lots 14 and 15—to which there appears to be no claim other than that of Hickey—you decided favorably to the heirs of this party. Appeal to this office has been taken on behalf of the latter.

37 The testimony shows that Hickey made settlement on the land in 1893; that his improvements thereon are confined to Lot 15, and consist of a log shanty, 12x14, built in 1894; a root house for storing vegetables; clearing of two to four acres; a wagon road about a mile in length, and a well; and that, with the exception of some temporary absences, when engaged at work elsewhere, Hickey's residence was continuous to date of his death.

This applicant appears to have been duly qualified to make entry of public land under the homestead law.

As above shown, the tracts which are claimed by the heirs of Hickey are located in different fractional quarter sections, viz:

Lot 12, Sec. 3, and Lots 9, 10, 14 and 15, Sec. 4, and were unsurveyed at date said party made his settlement (1893).

Township plat of survey was filed, as previously stated, July 22, 1896, at which time Hickey, it appears, tendered his application for the described lots.

The evidence presented at the hearing shows that the improvements made by this claimant, including his residence, are confined to Lot 15, Sec. 4.

September 25, 1899, *in re* Warren *v.* Gibson (29 L. D. 197), the Honorable Secretary held (syllabus) that

"In the case of a settlement claim for land in different fractional quarter sections, and surveyed as lots, the notice of the extent of the claim, given by occupancy and improvements, is limited to the particular lots occupied and improved."

38 This is in line with certain other decisions cited therein, all indicative of the Department's uniform attitude towards the question involved.

The claim of the heirs of Jerry Hickey, deceased, is therefore, hereby rejected as to Lot 12, Sec. 3, and Lots 9 and 10, Sec. 4—with a view to the approval of the company's application for the same—and allowed as to Lots 14 and 15, Sec. 4, these last two subdivisions being contiguously located in the same fractional quarter section, and there being no adverse claims of record thereto.

The usual right of appeal is allowed.

Very respectfully, W. A. RICHARDS,
Acting Commissioner.

8. Said Bridget Hickey thereafter, and within the time allowed for that purpose, appealed to the Secretary of the Interior from said decision of the Commissioner of the General Land Office and on February 11, 1903, the Secretary of the Interior reversed the said decision of the Commissioner of the General Land Office. The following is a true and correct copy of the said decision of the Secretary of the Interior:

39 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *February* 11, 1903.

BRIDGET HICKEY, Sole Surviving Heir of Jerry Hickey,
vs.
ST. PAUL, MINNEAPOLIS AND MANITOBA RY. COMPANY.

The Commissioner of the General Land Office.

SIR: Bridget Hickey, the mother of Jerry Hickey, deceased, and as his sole surviving heir, has appealed from your office decision of August 16, 1902, awarding to the St. Paul, Minneapolis and Manitoba Railway Company, lot 12, Sec. 3, and lots 9 and 10 of Sec. 4, T. 60 N., R. 24 W., Duluth land district, Minnesota, under its lieu selection made thereof.

December 31, 1895, the St. Paul, Minneapolis and Manitoba Railway Company filed in the local land office its application to

select certain described unsurveyed tracts of land, under the provisions of the act of August 5, 1892 (27 Stat. 390), which selection was accepted by the local land officers.

The plat of survey of T. 60 N., R. 24 W., was officially filed in the local land office July 22, 1896, and on that day Jerry Hickey tendered his homestead application for lot 12, Sec. 3, and lots 9, 10, 14 and 15, Sec. 4, alleging in support of said application that he had made settlement thereon March 27, 1893. As it appeared
40 that this application would conflict with the selection filed by the railway company December 31, 1895, Hickey's application was rejected, from which action he duly appealed.

On the same day the plat was filed the railway company also proffered a supplemental list of selections, adjusting its previous selections of December 31, 1895, to the lines of the public survey, which supplemental selection was rejected because it conflicted with the pending homestead application by Hickey and the company also appealed.

Hickey was subsequently held, but prior thereto Hickey had died. Upon the testimony adduced the local officers found that Hickey had settled as alleged long prior to the filing of the township plat and that his settlement claim was maintained up to the time of his death in 1897, but from the testimony it appeared that his improvements were confined to lot 15 of Sec. 4, and that his claim against the railway company must be restricted to the lands within the technical quarter section in which said lot 15 fell, there being no evidence showing that he had improved or in anywise indicated his claim outside of said quarter section. His claim therefore was recognized only as to lots 14 and 15 of Sec. 4. Upon appeal your office decision of August 16, 1902, affirmed the decision of the local officers, from which an appeal has been taken to this department.

The railway company's claim rests under its list filed while the land was yet unsurveyed and its supplemental list adjusting
41 its selection to the lines of the public survey, both of which were made under the act of August 5, 1892, by the terms of which the Manitoba company, in lieu of its relinquishment of other lands to which it had been held by the courts to be entitled, but which the United States had disposed of as public lands in disregard of the railroad claim, was granted a right to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any state into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released.

The third section of this act provided, among other things that—

In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a

reasonable degree of certainty, and within the period of three months after the lands including such tract shall have been surveyed, and shall be filed by said company, describing such tract according to such survey; and in case such tract as originally selected and described in the lists filed in the local land office shall not precisely conform with the lines of the official survey, the said com-
42 pany shall be permitted to describe such tract anew, so as to produce such conformity.

As the company was restricted in its selections to lands "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," the only question in this case is: Had Hickey initiated a claim to the land in question, within the meaning of the act of 1892, prior to the selection thereof by the railway company?

The act of May 14, 1880 (21 Stat. 140), extended to settlers upon unsurveyed public lands the right to make entry of the lands settled upon, under the homestead laws, within three months after the filing of the township plat and to have the right under such entry relate back to the date of settlement, the same as had been theretofore allowed under the pre-emption laws.

That Jerry Hickey, in 1893, made settlement upon an unsurveyed tract with intention of making claim thereto under the homestead law, and that he duly improved the same by the erection of a dwelling house in which he resided until his death in the spring of 1897, is in nowise questioned in this record. Upon the very day the plat of survey was officially filed in the local land office he made record of his claim, as before described, claiming his settlement thereon and thereby declaring that the land applied for was that claimed by him from the date of his settlement. The land included in his application is not in excess of 160 acres, is in a compact body, and the only objection to allowing the entry in
43 its entirety, as applied for, is that it was shown at the hearing that his improvements were confined to lot 15 of Sec. 4, and because of the intervening selection by the railway company his claim was limited to the legal subdivision upon which his improvements were situate.

That in the adjustment of conflicting settlement claims the notice given by improvements made upon a tract of land prior to the survey thereof is limited to the technical quarter section in which the same is shown to be upon survey, is held in a long line of departmental decisions; but the railway company is not in the position of a conflicting settlement claimant, and when making its selection it was bound to take notice of Hickey's improvements and to ascertain the land claimed by him. The surveyor, working in the interest of the company, and who examined the land prior to selection, admits that he found Hickey's improvements, but in its selection the company entirely disregarded Hickey's claim to be the technical quarter section embracing his improvements as well as to the adjoining land.

It is well to note that the witnesses offered at the hearing, namely, Frank Smith and W. E. Myers, both resided in the township in question and close to the land in dispute during the year 1893, and were well apprised of Hickey's claim, for when asked to give the exact description thereof included in their answers all the lands covered by his application as presented. It thus seems that his claim was well recognized by those residing in the neighborhood
44 of the land in question as early as 1893.

Two cases are relied upon by the railway company in support of its contention that Hickey's claim as against the selection should be restricted to the technical quarter section including his improvements, namely, Brown *v.* Central Pacific R. R. Co. (6 L. D. 151), and Union Pacific R. R. Co. *v.* Simmons (*ib.* 172). In both those cases, however, the lands were in the primary or place limits of the railroad grant and the limitations upon the grant were not the same as those attaching to the right of selection granted the Manitoba Company by the act of 1892. Further, in neither case was the claimant against the railroad company the person whose settlement was relied upon to defeat the grant, nor was it shown that such prior settler had ever filed any formal application in the land department including the tract there in question within his claim.

In Tarpey *v.* Madsen (178 U. S. 215, 220), in considering the rights of a settler upon public lands prior to survey in conflict with a right claimed under a railroad land grant, it was said by the court:

And in this respect we must notice the oft-repeated declaration of this court, that 'the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon.' Ard *v.* Brandon, 156 U. S. 537, 543; Northern Pacific Railroad *v.* Amacker, 175 U. S. 564, 567. With this declaration, in all its fullness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing
45 his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire.

The entire matter considered it is the opinion of this department that the record made in this case shows that Hickey had, prior to the selection of the land by the railway company, initiated a claim under the homestead laws to the entire tract embraced in his homestead application; that such right was duly and timely asserted and was a bar to the selection of said land by the Manitoba company under the act of August 5, 1892. The decision of your office is therefore accordingly reversed and upon completion of entry for this land by the heirs of Hickey, the selection by the company as to the land here in question will be canceled.

The papers are returned.

Very respectfully, E. A. HITCHCOCK.

9. On June 4, 1903, said Bridget Hickey filed in the District Land Office at Duluth, Minnesota, homestead application, in lieu of the application theretofore filed by Jerry Hickey which application had been lost, made the homestead affidavit required by Section 2290 Revised Statutes of the United States, paid the land office

fees and commissions required by said section and was thereupon allowed to make and did make the homestead entry mentioned or described in said Section 2290 Revised Statutes of the United States, for Lot 12 of Sec. 3, and Lots 9, 10, 14 and 15 of Sec. 4, Twp. 60 N., R. 24 W. The following is a true and correct copy of the
46 Receiver's receipt issued on said homestead entry:

Receiver's Duplicate Receipt No. 18845.

Application No. 18845.

RECEIVER'S OFFICE, DULUTH, MINN., *June 4th*, 1903.

Received of Bridget Hickey, for the heirs of Jerry Hickey, deceased, the sum of Fourteen Dollars no cents, being the amount of fees and compensation of Register and Receiver for the entry of Lot 12, Section 3, Lots 9, 10, 14 and 15 of Section 4, in Township 60 N. of Range 24 W., 4th P. M., under Section 2290 Revised Statutes of the United States.

J. N. SMITH, *Receiver.*

Said Bridget Hickey did not at any time make the final proofs required by Section 2291 Revised Statutes of the United States and the District Land Officers never issued the final homestead entry certificate mentioned in said Section 2291.

10. On July 1, 1903, the land described in the complaint herein was transferred from the Duluth Land District to the Cass Lake Land District in the State of Minnesota.

11. On July 2, 1903, said Bridget Hickey filed in the District Land Office at Cass Lake, Minnesota, her written relinquishment, wherein and whereby she released and relinquished to the United States all her claim, right, title and interest in and to the land embraced in the application of said Jerry Hickey and in the
47 homestead entry made by her as hereinbefore stated.

12. On July 2, 1903, John R. Donohue, the plaintiff herein, presented to the District Land Officers at Cass Lake, Minnesota, his application to make entry of said land under the Act of Congress approved June 3, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory" and the Acts amendatory thereof and supplemental thereto. Said application was allowed by said District Land Officers and thereafter and on October 12, 1903, said Donohue made and submitted his proofs under said act to the District Land Officers, paid the purchase price of said land as prescribed by said act and the land office fees and commissions. Said proofs were accepted by said District Land Officers and said Donohue was allowed to make and did make entry of said lands under said Act of Congress. Said Donohue was at the times mentioned a citizen of the United States and a resident and citizen of the State of Minnesota and possessed the qualifications necessary to entitle him to enter land under said Act of Congress. The following is a true and correct copy of the Receiver's receipt issued to said Donohue on said entry:

No. 154.

RECEIVER'S OFFICE AT CASS LAKE, MINN., *Oct.* 20, 1903.

Received from John R. Donohue, of Ramsey County, Minn., the sum of four hundred and seven dollars and no cents, being
48 in full for Lot 12, Section 3, Lots 9, 10, 14 and 15 of Section 4, in Township No. 66 N. of Range No. 24 W., 4th P. M., containing 162 80/100 acres at $2.50/100 per acre.

F. S. OAKLEY, *Receiver.*

$1.50/100 testimony fee receiver. Number of written words 1,000, rate per 100 words 15 cents.
$10.00 for T. & S. No. 3 filed July 2, 1903.

13. On February 18, 1904, and on March 25, 1904, the Commissioner of the General Land Office directed the District Land Officers at Cass Lake, Minnesota, to notify the St. Paul, Minneapolis and Manitoba Railway Company to perfect its selection of said Lot 12 of Sec. 3 and Lots 9 and 10 of Sec. 4, Twp. 60 N., R. 24 W., and suspended the entry of said Donohue therefor. The following are true and correct copies of the said letters of instruction of the Commissioner of the General Land Office.

Decision.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C.,
February 18, 1904.

Register and Receiver, Cass Lake, Minnesota.

SIRS: I am in receipt of your letter of January 18, 1904, transmitting in response to letter of this office of November 18, 1903, evidence as to the sole heirship of Bridget Hickey, mother of Jerry Hickey, deceased, and homestead claimant for Lot 12, Sec. 3, and Lots 9, 10, 14 and 15, Sec. 4, T. 60 N., R. 24 W.
49 The evidence is satisfactory and the relinquishment by Bridget Hickey of her claim as sole heir to the land is accepted. Her Homestead Entry No. 18845 is canceled and the case closed.

This releases from suspension the selection by the St. Paul, Minneapolis and Manitoba Railway Company under act of August 5, 1892, of Lot 12, Sec. 3, and Lots 9 and 10, Sec. 4—Lots 14 and 15 not appearing to be within the company's original selection.

You will inform Mrs. Hickey of the above action, and also advise the company thereof, and that thirty days' preference right will be allowed it in which to perfect its selection of said Lot 12, Sec. 3, and Lots 9 and 10, Sec. 4, in accordance with its Duluth List 7 (Supplemental to List 5) filed July 22, 1896.

The application of Edgar A. Coffin as assignee of Symantha J. Eckols, widow of John A. Eckols, to make soldier's additional homestead entry of Lots 14 and 15, Sec. 4, embraced in Mrs. Hickey's

homestead entry, and his relinquishment thereof because of conflict with her entry will be considered in another communication.

Very respectfully, J. H. FIMPLE,
Acting Commissioner.

50 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 25, 1904.

Register and Receiver, Cass Lake, Minnesota.

SIRS: I am in receipt of your letter of March 11, 1904, referring to office letter of February 18, 1904, in the matter of homestead entry of Bridget Hickey, heir of Jerry Hickey, of Lot 12, Section 3, and Lots 9, 10, 14 and 15, Section 4, Township 60 North, Range 24 West; said letter canceled the entry of Mrs. Hickey on relinquishment and you were directed to advise the St. Paul, Minneapolis and Manitoba Railway Company, that 30 days' preference right would be allowed it in which to perfect its selection of Lot 12, Section 3, and Lots 9 and 10, Section 4, under its Duluth List 7, supplemental to List 5, filed July 22, 1896.

You now report that on July 2, 1903, the day Mrs. Hickey filed her relinquishment, John R. Donohue made timber and stone application No. 3, for the land and that in October 20, 1903, you issued to him Cash Certificate No. 154 and that you have taken no action on office letter of February 18, 1904.

This entry should not have been allowed, the contest for this land was between the railway company and the heirs of Jerry Hickey,
but before the final action on the case and the rejection of the
51 company's application to select, the claim of the heirs of
Hickey was relinquished and their homestead — canceled which left the land subject to the application of the company.

You will, therefore notify the company in accordance with instructions of February 18, allowing it 30 days from notice in which to perfect its selection.

The entry of Donohue will be held suspended subject to the action of the company, and should it perfect the selection the entry will be held for cancellation.

Very respectfully, W. A. RICHARDS,
Acting Assistant Commissioner.

Thereafter, and within the time prescribed by the order of the Commissioner of the General Land Office, the St. Paul, Minneapolis and Manitoba Railway Company completed the adjustment of its selection of said land to the lines of the public surveys and perfected said selection as required by the said Act of August 5, 1892, and the instructions of the Commissioner of the General Land Office.

14. On July 22, 1904, the Commissioner of the General Land Office held for cancellation the entry of said Donohue. The following is a true and correct copy of the said decision of the Commissioner of the General Land Office:

52 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 22, 1904.

Register and Receiver, Cass Lake, Minnesota.

SIRS: Referring to the decision of this office of March 25, 1904, allowing the St. Paul, Minneapolis & Manitoba Railway Company to perfect its selection of Lot 12, Sec. 3, Lots 9 and 10, Sec. 4, T. 60 N., R. 24 W. under act of August 5, 1892, I am now in receipt of your letter of July 8, 1904, enclosing the selection of the company executed in due form, and, in accordance with said decision, I now hold for cancellation subject to appeal the conflicting timber cash entry No. 154 of John R. Donohue to the extent of said tracts.

Promptly notify him hereof and of his right of appeal.

Very respectfully, W. A. RICHARDS,
Commissioner.

Thereafter, and within the time allowed for that purpose, said Donohue duly appealed from said decisions of the Commissioner of the General Land Office of March 25th and July 22, 1904, to the Secretary of the Interior. On December 16, 1904, the Secretary of the Interior affirmed the said decisions of the Commissioner of the General Land Office. The following is a true and correct
53 copy of the said decision of the Secretary of the Interior:

DECEMBER 16, 1904.

JOHN R. DONOHUE
vs.
ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The Commissioner of the General Land Office.

SIR: December 31, 1905, the St. Paul, Minneapolis and Manitoba Railway Company, made application to select lot 12 of Sec. 3, and lots 9 and 10 of Sec. 4, T. 60 N., R. 24 W., Cass Lake, Minnesota, land district, then unsurveyed, under the act of August 5, 1892 (27 Stat. 390), in lieu of lands relinquished by said company to which it was entitled, but which the United States had disposed of.

July 22, 1896, the plat of survey of the township in which said tracts are located, was filed in the local office, and on that day the railway company filed its supplemental selection list therefor, made to conform to the lines of the survey. On the same day one Jerry Hickey tendered his homestead application for the same tracts, including also lots 14 and 15 of said section 4, alleging settlement thereon in March, 1893, with continuous residence ever since. Both of said applications were rejected by the local officers, from which action each party appealed.

It appears that in the spring of 1897, while said case was pending on appeal, in your office, Hickey died, leaving his mother, Bridget Hickey, as his sole surviving heir, and that subsequently under direction of your office, a hearing was had in order to determine
54 whether the applicant, Jerry Hickey, had made settlement on the lands in controversy prior to the time the railway com-

pany made its application therefor. As a result thereof the local officers, on April 11, 1902, recommended that Hickey's application be rejected, as to the lots claimed by the railway company, but allowed as to those not in conflict. Appeal was taken and your office on August 12, 1902, affirmed said decision, from which an appeal was taken to the department.

February 11, 1903, the department found that Hickey had, prior to the selection of the land by the railway company, initiated a claim under the homestead laws to the tracts covered by his application, and that his rights were superior to those of said company. The decision of your office was reversed and direction was given that "upon completion of entry for this land by the heir of Hickey the selection by the company as to the land here in question will be canceled." Hickey *v.* St. Paul, Minneapolis and Manitoba Railway Company (32 L. D. 8.)

It appears that the homestead application of Jerry Hickey having been lost, Bridget Hickey, as heir, on June 4, 1903, filed another homestead application for all of the land embraced in the application of Jerry Hickey, and was allowed to make entry thereof.

July 2, 1903, the relinquishment of said entry by Bridget Hickey was filed in the local office and on the same day John R. Donohue tendered his application to make purchase of said tracts under
55 the timber and stone act of June 3, 1878 (20 Stat. 89), and October 20, 1903, he made payment therefor and cash certificate was issued to him by the local officers.

February 18, 1904, your office canceled the entry of Bridget Hickey on reliquishment, and the local officers were directed to advise the St. Paul, Minneapolis and Manitoba Railway Company that it would be allowed thirty days' preference right within which to perfect its selection of the lots theretofore applied for by it (lot 12 of Sec. 3, and lots 9 and 10 of Sec. 4).

Subsequently, upon the report to your office by the local officers of the entry by Donohue and that they had taken no action under your instructions of February 18, 1904, your office, on March 25, 1904, renewed said instructions, and regarding the entry of Donohue, it was said that, "this entry should not have been allowed, the contest for this land was between the railway company and the heirs of Jerry Hickey, but before the final action on the case, and the rejection of the company's application to select, the claim of the heirs of Hickey was relinquished and their homestead — canceled which left the land subject to the application of the company." The entry of Donohue was suspended subject to the action of the company under the permission given it to perfect its selection.

July 22, 1904, your office having received from the local officers the perfected selection by the railway company of said lands, made in accordance with the instructions given, the conflicting
56 timber and stone cash entry of Donohue was held for cancellation. From said decisions of March 25 and July 22, 1904, Donohue has appealed to the department.

The contention on behalf of Donohue seems to be that under departmental decision of February 11, 1903, in Jerry Hickey's favor,

the company was absolutely barred from thereafter completing its selection of said lands, even though Hickey's heir should fail to make final entry, and that said company's selection should thereupon have been canceled; that upon the cancellation on reliquishment, of the entry subsequently made by the heir, Bridget Hickey, the land reverted to the government and again became subject to entry.

The department does not concur with this view of the matter, it having been shown in the case that Jerry Hickey had, in his lifetime, a settlement on the land prior to the time the company applied to select the same, and that he had made timely assertion of his claim thereto, the department held, in effect, in its decision, rendered in the case February 11, 1903, that Hickey had a better right to said land than the company and that "upon completion of entry for this land by the heir of Hickey, the selection by the company as to the land here in question will be canceled."

The cancellation of the company's selection was rightfully withheld awaiting the action of the heir, Bridget Hickey, under said ruling. Instead of making "completion of entry," it appears that she filed a new application, as heir, and made an original
57 entry of the land. This was not contemplated in departmental decision, or necessary, and it must be held that, upon the reliquishment of said entry by Bridget Hickey, the rights of the company under its selection, which was still pending, attached, and the entry of Donohue should not have been allowed.

Your office decision is accordingly affirmed and the papers are returned herewith.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

Thereafter, and within the time allowed for that purpose, said Donohue duly presented to and filed with the Secretary of the Interior his motion for the review of said decision of December 16, 1904. Thereafter, and on March 17, 1905, the said motion for review was overruled and the decision of December 16, 1904, affirmed by the Secretary of the Interior. The following is a true and correct copy of the said decision of the Secretary of the Interior:

MARCH 17, 1905.

JOHN R. DONOHUE
vs.
ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The Commissioner of the General Land Office.

SIR: The department has considered the motion filed by John R. Donohue for review of the decision of December 16, 1904, affirming your office decision holding for cancellation the timber and stone land purchase made by him under the act of July 3, 1878 (20 Stat.
89), covering lot 12 of Sec. 3, and lots 9 and 10 of Sec. 4,
58 T. 60 N., R. 24 W., Cass Lake, Minnesota, land district, for conflict with the prior selection made of said land by the

St. Paul, Minneapolis and Manitoba Railway Company, under the provisions of the act of August 5, 1892 (27 Stat. 390).

The tract in question was first selected December 31, 1895, by the St. Paul, Minneapolis and Manitoba Railway Company while the land was yet unsurveyed, and upon the filing of the township plat of survey July 22, 1896, the railway company filed its supplemental list of selections, conforming its previous selections to the line of the public survey. On the same day one Jerry Hickey tendered a homestead application for this and other land, alleging settlement thereon in March, 1893. This application was rejected and he appealed to your office, but before action was taken thereon he died, leaving his mother, Bridget Hickey, as his sole surviving heir. After his death your office ordered a hearing upon his allegation of settlement antedating the company's selection, and upon the record made at said hearing both your office and the local officers decided against the homestead claimant and in favor of the railway company. The case was prosecuted on appeal to this department resulting in departmental decision of February 11, 1903 (32 L. D. 8). By that decision the concurring decisions of your office and the local officers were reversed and it was held that upon completion of entry by the heir of Hickey the company's selection would be canceled.

59 The present controversy between Donohue and the railway company is really a prolongation or extension of the original contest, for it seems that as soon as a favorable decision was secured upon the Hickey contest, original homestead entry was completed of the land and was immediately relinquished, whereupon Donohue tendered an application to purchase the land under the timber and stone act.

In the original decision in this case upon the Hickey contest, the department was moved to its conclusion because of those considerations that are often extended by this department and the courts in favor of the pioneer settler upon public lands. The case invoked by the department in reaching its conclusion was that of Tarpey *v.* Madsen (178 U. S. 215, 220), wherein it was said by that court: And in this respect we must notice the oft-repeated declaration of this court, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." Ard *v.* Brandon, 156 U. S. 537, 543; Northern Pacific Railroad *v.* Amacker, 175 U. S. 564, 567. With this declaration, in all its fulness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire.

Had the real condition been then presented to the department, namely, that the land was not desired by the original settler and those dependent on and claiming through him, but rather

60 that such claim was being used merely for the purpose of avoiding a selection in all other respects regular and valid, to the end that a third party might at this late day initiate a claim to the land, a different conclusion would have been reached; in fact, the authority invoked would have supported such a conclusion.

The department cannot, therefore, under the circumstances hereinbefore detailed, accord to Donohue a superior claim under his application. It is unnecessary to specifically consider the technical questions sought to be raised in the motion now under consideration. Suffice it to say, that the cases referred to have no application to the facts presented herein and upon a most careful consideration of the entire matter the department adheres to its decision of December 16 last, and the motion for review is therefore accordingly denied and herewith returned to the files of your office relating to said case.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

Thereafter and on April 10, 1905, pursuant to said decisions, the said entry of said Donohue was canceled on the files and records of the Land Department by the Commissioner of the General Land Office. The following is a true and correct copy of the said order of the Commissioner of the General Land Office:

61 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 10th*, 1905.

Register and Receiver, Cass Lake, Minnesota.

SIRS: Referring to my letter to you of February 11, 1905, informing you that John R. Donohue had filed a motion for review of departmental decision of December 16, 1904, affirming the decision of this office of July 22, 1904, holding for cancellation his timber and stone cash entry No. 154, to the extent of Lot 12, Sec. 3, and Lots 9 and 10, Sec. 4, T. 60 N., R. 24 W., for conflict with the selection thereof by the St. Paul, Minneapolis and Manitoba Railway Company, under the act of August 5, 1892, I herewith enclose you a copy of departmental decision of March 17, 1905, adhering to its decision of December 16, 1904, and denying the motion for review.

In accordance therewith the decision of this office of July 22, 1904, holding for cancellation Donohue's entry to the extent of the tracts above named, is hereby made final, the entry canceled for said tracts and the case closed. Inform all parties in interest hereof.

By my letter of February 18, 1904, cancelling the entry of the heirs of Jerry Hickey for this land, you were directed to allow the railway company to perfect its selections thereof.

62 Its list was received with your letter of July 8, 1904, but you withheld your certification thereof because the entry of Donohue had not been canceled. Said list is now herewith returned to you with instruction to certify same and retransmit to this office (after entry in your record if not already entered), without delay.

Very respectfully, J. H. FIMPLE,
Acting Commissioner.

15. Thereafter, and at some time in the month of June, 1905, the Secretary of the Interior approved the selection made by the St. Paul, Minneapolis and Manitoba Railway Company, hereinbefore men-

tioned, and thereafter, and on June 30, 1905, the patent of the United States was issued to said railway company conveying to said company, under the provisions of the said Act of August 5, 1892, the said Lot 12 of Sec. 3, and Lots 9 and 10 of Sec. 4, Twp. 60 N., R. 24 W.

16. Said Donohue never had or claimed any interest in or to said land until after the relinquishment of the said homestead entry by Bridget Hickey and never had or claimed any interest whatever in said land except such as he may have acquired under and by virtue of his said stone and timber land entry. Said Donohue was the attorney for said Bridget Hickey in the proceedings before the Land Department of the United States hereinbefore mentioned.

17. The foregoing contains all the facts involved in this case and all the orders and decisions of the several branches of the
63 Land Department of the United States in the controversy or proceedings in said department between Jerry Hickey and the heirs of Jerry Hickey and the St. Paul, Minneapolis and Manitoba Railway Company and between said Donohue and said Railway Company, concerning the land involved in this action.

JOHN R. DONOHUE,
Plaintiff pro se.
THOS. R. BENTON,
Attorney for Defendant.

St. Paul, Minn., November 29, 1905.

(Title of Cause.)

This cause having been tried by the Court, without a jury, J. R. Donohue, Esq., appearing for plaintiff, and Thomas R. Burton, Esq., appearing for the defendant.

The Court upon the stipulation of facts filed in said case, and the pleadings, find:

As Facts.

1. That in the month of March, 1893, Jerry Hickey, then a citizen of the United States and possessing the qualifications prescribed by the homestead laws of the United States, entered upon, took possession of and made settlement and improvement upon a tract of unsurveyed land, which on survey was found to be Lot 12 of Section 3, and Lots 9, 10, 14 and 15 of Section 4, Township 60, North of Range 24 West, in the State of Minnesota; that said land
64 was then vacant, unsurveyed public land of the United States and subject to such settlement; that said Jerry Hickey continued in the possession and occupation of said tract of land as a homestead by residing upon, improving, cultivating and otherwise using said land as a homestead, in full compliance with the homestead laws of the United States, with the intention of making claim thereto under said homestead laws, until his death, in the month of March, 1897.

2. That on December 31, 1895, the defendant herein filed in the United States District Land Office at Duluth, Minnesota, its appli-

cation to select certain unsurveyed lands in said unsurveyed Township 60, North of Range 24 West, under the provisions of the act of Congress approved August 5, 1892, entitled, "An Act for the Relief of Settlers upon certain lands in the States of North Dakota and South Dakota," which application was found upon survey to include Lot 12 of Section 3, and Lots 9 and 10 of Section 4, Township 60, North of Range 24 West.

3. That the official plat of the United States survey of said Township 60, North of Range 24 West, was filed in the United States District Land Office at Duluth, Minnesota, on July 22, 1896; that on said day said Jerry Hickey, being then and there a duly qualified homestead claimant, duly made application to the Register and Receiver of the said United States District Land Office at Duluth, Minnesota, to enter under the homestead laws of the United
65 States the lands upon which he had previously settled, namely, Lot 12 of Section 3, and Lots 9, 10, 14 and 15 of Section 4, Township 60, North of Range 24 West, and tendered to said *said* Register and Receiver the proper affidavits and fees, as required by the homestead laws of the United States; that in said application said Jerry Hickey alleged and claimed that he made settlement upon said land on March 22, 1893; that said application and affidavits were then and there duly received and noted on the records of said District Land Office, but the said application was by the said Register and Receiver rejected because it conflicted with the application to select previously made by the defendant.

4. That on July 22, 1896, the defendant herein filed in the United States District Land Office at Duluth, Minnesota, its supplemental list adjusting its application to select of December 31, 1895, to the lines of the government survey; that said supplemental list was rejected by said District Land Officers as to said Lot 12 of Section 3, and Lots 9 and 10 of Section 4, Township 60, North of Range 24 West because the same conflicted with the homestead application of said Jerry Hickey.

5. That the tract of land embraced in said Jerry Hickey's homestead application is not in excess of 160 acres, and is in a compact body.

6. That prior to the filing of defendant's application to select, namely, on December 31, 1895, said Jerry Hickey had initiated a claim under the homestead laws to the entire tract embraced in his homestead application, namely, Lot 12 of Section 3, and
66 Lots 9, 10, 14 and 15 of Section 4, Township 60, North of Range 24 West; that he duly and timely asserted said right and made a record of his right and claim in the District Land Office at Duluth, Minnesota, on July 22, 1896, and said attached right and claim, by reason of his residence and settlement, related back to the date of settlement, namely to March 22, 1893.

That the secretary of the interior while said matter was pending before the department, and on appeal from the order of the Register and Receiver, rejecting the application of said Jerry Hickey, held by his departmental letter relating to said appeal, dated February 11, 1903, and to which appeal the said St. Paul, Minneapolis &

Manitoba Ry. Co. was a party, that said "Hickey had prior to the selection of the land by the railway company initiated a claim under the homestead laws of the entire tract embraced in his homestead application; that such right was duly and timely asserted and was a bar to the selection of said land by the Manitoba Company under the Act of August 5th, 1892, and upon completion of entry for this land by the heirs of Hickey, the selection by the company as to the land here in question will be canceled."

That by the initiation of such claim and the settlement on said land and the other acts done by said Hickey in pursuance of his entry upon said lands, the said lands and the whole thereof became segregated from the mass of public lands and was not subject to the attempted selection thereof by the defendant.

67 7. That on March 25, 1897, said Jerry Hickey, then a resident on the land embraced in his homestead application and while said case was pending on appeal in the United States General Land Office, died, leaving as his sole surviving heir his mother, one Bridget Hickey, who was then a citizen of the United States, and residing at the City of Calais, in the State of Maine.

8. That thereafter divers proceedings were had in the United States Land Department in said case, and on June 4, 1903, said Bridget Hickey, who was then a citizen of the United States and otherwise possessing the qualifications of a homestead claimant for the heirs of Jerry Hickey, deceased, under the direction and order of the Land Department of the United States, duly completed the homestead entry before made by said Jerry Hickey for said Lot 12 of Section 3, and Lots 9, 10, 14 and 15 of Section 4, Township 60, North of Range 24 West. That said entry was complete, in due form, and was in full compliance with the homestead laws of the United States and was duly allowed by the District Land Officers at Duluth, Minnesota.

9. That on July 1, 1903, the land described in the complaint herein and in controversy, was transferred from the Duluth Land District to the Cass Lake Land District, in the State of Minnesota.

10. That on July 2, 1903, said Bridget Hickey, for the heirs of Jerry Hickey, deceased, relinquished to the United States government all her claim, right, title and interest in and to the land embraced in the homestead application of said Jerry Hickey;

68 that said land then and there became government land and part of the public domain, and was subject to entry by the first legal applicant.

11. That on July 2, 1903, and subsequent to the filing of said relinquishment, and while the said Lot 12 of Section 3, and Lots 9, 10, 14 and 15 of Section 4, Township 60, North of Range 24 West, were still government land and part of the public domain and subject to entry under the laws of the United States government, said plaintiff, at the Cass Lake, District Land Office, did make cash entry number 154, under the act of Congress approved June 3, 1878, entitled, "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada and in Washington Territory," and

the acts amendatory thereof and supplemental thereto for said Lot 12, Section 3, and Lots 9, 10, 14 and 15 of Section 4, Township 60, North of Range 24 West; that his entry was in due form and in strict compliance with said law and was duly allowed by the said District Land Officers. That said plaintiff was at said time a cit-zen of the United States and a resident of the State of Minnesota, and possessed the qualifications necessary to entitle him to enter land under said act of Congress.

12. That thereafter, on October 12, 1903, said plaintiff duly made and submitted his proofs under said act of Congress to the said District Land Officers, paid the purchase price of said land as prescribed by said act, and the Land Office fees and commissions. Said proofs were duly accepted by said District Land Officers and said
69 plaintiff was allowed to make, and did make entry of said lands under said act of Congress and fully complied with the laws of the United States and the rules and regulations of said Land Department relative to obtaining the legal title to said land.

13. That thereafter, through a mistake of fact and law on the part of the officials of the United States Land Department, plaintiff's said cash entry was wrongfully and illegally suspended, and subsequently was wrongfully and illegally canceled.

14. That thereafter, through a mistake of fact and law on the part of the Officials of the United States Land Department, the defendant was allowed to perfect its selection, and subsequently, through a like mistake of fact and law on the part of the officials of the United States Land Department, a patent to said land was wrongfully and illegally issued to said defendant.

15. That the plaintiff is the equitable owner of said premises and he is entitled to the legal title thereof.

16. That save and except wherein the contrary facts are herein found, all the allegations of the complaint are found to be true and all the allegations of the answer are found to be untrue.

As Conclusions of Law.

1.

That plaintiff is the owner of said premises.

70

2.

That the defendant has no right, title or interest in or to said premises.

3.

That said defendant holds the legal title from the United States government of said premises in trust for plaintiff.

4.

That the defendant, within ten (10) days after the service upon it of a certified copy of the judgment herein, shall deliver to said plaintiff a deed duly executed by it, conveying said land to the plaintiff.

5.

That in case said defendant fails to execute and deliver the deed as hereinbefore required, then the judgment entered herein shall have all the force and effect of the deed provided for in the fourth paragraph of these conclusions, upon the recording of a certified copy of said judgment in the office of the Register of Deeds of said county.

6.

Awarding the plaintiff his costs and disbursements herein.

Let judgment be entered accordingly.

M. A. SPOONER,
District Judge.

Dated May 8th, 1906.

71 *Memorandum.*

On the stipulated facts and the pleadings in said action, I have come to the conclusion that Jerry Hickey prior to the attempted selection of the land in controversy by the defendant company had initiated a claim under the homestead laws of the United States to the entire tract embraced in his application.

Independently of such finding, however, the Secretary of the Interior having decided by his departmental letter dated February 11th, 1903, to the effect that said "Hickey had prior to the selection of the land by the railway company initiated a claim under the homestead law of the entire tract embraced in his homestead application; that such right was duly and timely asserted, and was a bar to the selection of the said land by the Manitoba Company under the Act of August 5th, 1892," such finding of the Land Department, it would seem, is conclusive and controlling upon the courts.

N. P. Ry. Co. *v.* McCormick, 89 Fed. 659.
Lee *v.* Johnson, 116 U. S. 48.
Carr *v.* Fife, 156 U. S. 494.
Johnson *v.* Towsley, 13 Wallace, 72.

By such entry made by said Hickey the land was segregated from the public domain and was not open for selection by the railway company, and upon subsequent relinquishment filed reverted
72 to the United States as public lands open to entry.

Hastings & Dakota Ry. Co. *v.* Whitney, 132 U. S. 357-366.
Kansas Pacific Ry. Co. *v.* Dunmeyer, 113 U. S. 629-644.
Wilcox *v.* Jackson, 38 U. S. (3 Peters) 498.
Witherspoon *v.* Duncan, 71 U. S. (4 Wallace) 210.
U. S. *v.* Turner, 54 Fed. 228.
Railroad Co. *v.* Johnson, 16 Pac. 129.
Carroll *v.* Safford, 49 U. S. (3 Howard) 441.
St. Paul, M. & M. Ry. Co. *v.* Leech, 3 L. D. 506.
Perkins *v.* Central Pacific, 1 L. D. 357.
Graham *v.* H. & D. Ry. Co. 1 L. D. 362.
M. K. & T. Ry. Co. *v.* Troxel, 17 L. D. 122.

The status of the railway company having been fixed and established at the time of its attempted selection in that the lands were not affected by such selection, because of having been previously segregated, the effect of the relinquishment was not to revive or make valid any claim under the original attempted selection, but, upon such relinquishment being filed, the land became restored to the great mass and body of public land and was subject to entry from that time on, unaffected by the previous attempted selection by the railway company.

Kansas & Pacific Ry. Co. *v.* Dunmeyer, 113 U. S. 629.
Johnson *v.* Towsley, 13 Wallace, 72.
H. & D. Ry. Co. *v.* Whitney, 132 U. S. 357.
U. S. *v.* Turner, 54 Fed. 228.
Perkins *v.* Central Pacific Ry. Co., 1 L. D. 357.
M. K. & T. Ry. Co. *v.* Troxel, 17 L. D. 122.

73 Assuming my position to be correct with reference to the foregoing sugestions, the attempted entry of the plaintiff should have been recognized by the department, to the exclusion of the claim of the railway company.

SPOONER, *J.*

(Title of Cause.)

To John R. Donohue, Plaintiff, *pro se:*

You will please take notice that the defendant herein will, on the 19th day of June, 1906, at the Court House in Park Rapids, in the County of Hubbard, State of Minnesota, at the hour of 2 P. M., or as soon thereafter as counsel can be heard, on the files and records herein, move the Court to modify and amend its findings of fact filed herein on the 17th day of May, 1906, in the following manner, to-wit:

1. Amend Finding No. 2 by adding thereto the following: "That said company duly paid to the Receiver of said land district the legal fees for such selection and its application was accepted and filed by said District Land Officers and noted on their records."

2. Amend Finding No. 4 by adding thereto the following: "That said Railway Company thereupon and within the time for that purpose allowed, duly appealed from the decision of said District Land Officers to the Commissioner of the General Land Office.

74 "That on October 12, 1901, the Commissioner of the General Land Office directed the District Land Officers at Duluth, Minnesota, to order a hearing for the purpose of determining whether said Jerry Hickey had made a settlement upon and established his residence under the homestead laws of the United States on the lands described in his said application prior to and at the time of the filing of the defendant's application to select same. That testimony was duly taken in said proceeding, after due notice to said Bridget Hickey and defendant, and on April 11, 1902, said District Land Officers held and decided that said Jerry Hickey never made any improvements, erected any buildings or blazed any lines

around or in any manner gave notice of a claim to Lot 12 of Section 3 or Lot 9 or Lot 10 of Section 4, Twp. 60 N., Range 24 W. That said Register and Receiver rejected the homestead application of said Jerry Hickey as to Lot 12 of Section 3 and Lots 9 and 10 of Section 4, said township and range."

"That said Bridget Hickey, as heir of Jerry Hickey, duly appealed from said decision of the Register and Receiver to the Commissioner of the General Land Office. That said Commissioner of the General Land Office on August 16, 1902, held and decided that during the year 1893 said Jerry Hickey made settlement on Lot 15 of Section 4, Twp. 60 N., Range 24 W., and resided thereon to the time of his death. That the residence, cultivation and improvements of said Jerry Hickey were confined to Lot 15 of Sec-
75 tion 4. That said Commissioner affirmed the said decision of the Register and Receiver of the United States Land Office at Duluth, Minnesota."

3. Amend Finding No. 6 by striking out the same and inserting the following in lieu thereof, to-wit:

"That said Bridget Hickey, as heir of said Jerry Hickey, duly appealed to the Secretary of the Interior from the said decision of the Commissioner of the General Land Office. That on February 11, 1903, the said Secretary of the Interior held and decided that the settlement of said Jerry Hickey on Lot 15 of Sec. 4, Twp. 60 N., Range 24 W., was in the contemplation of the homestead law a settlement on all the lands described in his said homestead application. That said Jerry Hickey had, prior to selection of said land by defendant, initiated a claim under the homestead law to the entire tract embraced in his said homestead application; that such right was duly and timely asserted and was a bar to the selection of said land by defendant. That the heirs of said Jerry Hickey would be permitted to complete entry of said land and that when entry had been completed by said heirs, the defendant's selection would be canceled."

4. Amend Finding No. 12 by inserting at the end thereof the folfowing, to-wit:

"That said John R. Donohue, plaintiff herein, was the attorney for said Bridget Hickey in the proceedings before the Land Department of the United States and had full knowledge and notice of defendant's claim to said land at the time he made his appli-
76 cation and entry under said timber and stone law."

55. Amend Finding No. 16 by striking out the same and inserting the following in lieu thereof, to-wit:

"That all the facts set forth in the stipulation of facts offered in evidence and made part of the record herein are found to be true."

THOS. R. BENTON,
Attorney for Defendant.

St. Paul, Minn., June 4, 1906.

(Title of Cause.)

This matter came before the Court at the general June Park Rapids term thereof on the 19th day of June, 1906, pursuant to the notice of a motion by the defendant for amended findings herein, and by agreement of the parties the hearing of the matter was continued to be taken up in St. Paul at some time convenient to the judge, and the matter being taken up at St. Paul on the 2nd day of July, 1906, the plaintiff appeared in person, and the defendant was represented by Thomas R. Benton, Esq.

Now, with the consent of both parties, the proposed amended findings of fact were withdrawn, and it was agreed that the 16th finding be changed to read as follows, to-wit:

"That all the matters and conditions agreed upon by the parties in the stipulation of facts filed in said action are true."

77 In pursuance of the said agreement, it is ordered that the finding of fact number 16 in said action be, and the same hereby is amended to read as follows:

"That all the matters and conditions agreed upon by the parties in the stipulation of facts filed in said action are true."

Dated at St. Paul, Minn., July 2, 1906.

M. A. SPOONER,
District Judge.

(Title of Cause.)

It is hereby stipulated that the annexed contains all the evidence and proceedings had in the trial of this action, and that the same may be examined and allowed by the Court as the settled case herein without further notice to either party.

J. R. DONOHUE,
Plaintiff pro se.
THOS. R. BENTON,
Attorney for Defendant.

St. Paul, Minn., July 2, 1906.

I hereby certify that I have examined the foregoing proposed case, consisting of thirty pages, and that the same contains all the evidence offered or received and all proceedings in said action, and that said case is in all respects conformable to the truth; and the same is hereby settled and allowed and ordered to stand and be filed

78 as and for the settled case in said action.

M. A. SPOONER,
District Judge.

St. Paul, Minn., July second, 1906.

(Title of Cause.)

To John R. Donohue, Plaintiff:

You will please take notice that the defendant herein will on the 28th day of July, 1906, at the Court house in the Village of Bemidji,

in the County of Beltrami, State of Minnesota, at the hour of 10 o'clock A. M. or as soon thereafter as counsel can be heard, on the settled case and the files and records herein, move the Court to amend its conclusions of law filed herein on the 17th day of May, 1906, so that the same shall read as follows:

As Conclusions of Law.

1.

That defendant is the owner of the land and premises described in the complaint.

2.

That the plaintiff has no right, title or interest in or to said lands and premises.

3.

That this action be dismissed.

79 4.

Awarding to defendant its costs and disbursements herein.

THOS. R. BENTON,
Attorney for Defendant.

St. Paul, Minn., July 14, 1906.

(Title of Cause.)

Order.

This matter came before the Court on the 28th day of July, 1906, at the Court House in the City of Bemidji, in the County of Beltrami, State of Minnesota, at the hour of 10 o'clock A. M.; Thomas R. Benton, Esq., appearing for the defendant, and John R. Donohue, Esq., appearing in person; upon the motion of the defendant made upon the settled case and the files and records herein to amend the conclusions of law filed herein on the 17th day of May, 1906, so that the same shall read as follows:

"As Conclusions of Law:

1.

That the defendant is the owner of the lands and premises described in the complaint.

2.

That the plaintiff has no right, title or interest in or to said lands and premises.

80 3.

That this action be dismissed.

4.

Awarding to the defendant its costs and disbursements herein."

And the Court having considered said matter, together with the

briefs and arguments presented by counsel, and the court being now advised in the premises,

It is Ordered, that the said motion of the defendant be and the same hereby is in all things denied.

Dated August 8th, 1906.

M. A. SPOONER,
District Judge.

Memorandum.

The contention of counsel for the defendant seems to be that because the land in question is claimed by the defendant under an indemnity grant the decisions in the cases heretofore cited, viz:

Hastings & Dak. Ry. Co. *v.* Whitney, 132 U. S. 357.
Whitney *v.* Taylor, 158 U. S. 85,

and others do not apply; and counsel cites, and evidently relies upon,

Oregon & California R. R. Co. *v.* U. S., 190 U. S. 186;
Northern Pac. R. R. Co. *v.* Dean, *et al.*, 27 L. D. 462;
Northern Pac. R. R. Co. *v.* Fly, *id.* 464;
81 Dunnigan *v.* Nor. Pac. R. R. Co., *id.* 467;

to support his contention.

I am unable to agree with counsel.

Oregon & California R. R. Co. *v.* U. S. does not modify the doctrine laid down in Hastings & Dak. Ry. Co. *v.* Whitney, 132 U. S., and Whitney *v.* Taylar, 158 U. S., and the other cases cited in the opinion. In that case (Oregon & Cal. R. R. Co. *v.* U. S.) it appears that "the land was abandoned fifteen years before the lands were selected by the company and nothing remained to indicate that the land was reserved, except the donation notification in the office of the surveyor general." The most that can be claimed for this case is that it holds that the R. R. Co. might show that an apparent claim arising from the filing of the donation notification was not in fact a subsisting claim; and that the same had long been abandoned before the selection by the R. R. Co.

In two of the cases cited in 27 L. D., viz: the Dean and Fly cases, there never had been a filing of record. All that had been done was to make settlement upon the land. Appli-ation to enter upon the land was presented, but rejected, and no formal entry of the land was ever completed. Uuon notification to complete their entries, the applicants failed to do so. There never was any filing of record, and in each of the instances it may well be said that the land had not been segregated from the mass of public land.

In the Dunnigan case, selection was made by the R. R. Co. in December, 1883. Dunnigan tendered his pre-emption declara-
82 tory statement October, 1887, claiming a right superior to that of the R. R. Co. because he had purchased from the administrator of one Buschmann's estate improvements placed on the land by Buschmann in his lifetime, it appearing that the latter was never qualified to enter the land, and it not appearing that he ever applied to enter the land.

The facts in the case at bar are entirely different from the facts in the O. & C. R. R. Co. case and the cases of Dean, Fly, and Dunnigan. "During the year 1893 Jerry Hickey entered upon, took possession of, and made settlement and improvement" upon the land in dispute. "On December 31, 1895, the defendant herein filed its application to select." On June 4, 1903, Bridget Hickey, the mother and sole heir of Jerry Hickey, the latter having died in the meantime, was permitted under the ruling of the secretary of the interior to enter and did enter the land in dispute.

The entry having thus been completed and of record, rights acquired thereunder related back to the date of settlement which was prior to any attempt on the part of the defendant to make its selection.

The doctrine apparently laid down in the Dean case, and followed in the Fly and Dunnigan cases, seems to be developed from the proposition that "It would be inequitable as well as illegal to hold that a mere application to file, never completed, and under which no right is now being asserted, served to reserve the land, in all re-
83 spects regular as far as shown by the record before me, to the end that application presented at a date subsequent to the selection of the land might take precedence over the selection.

The peculiar language of the granting act under which defendant seeks to take should be noted, the language employed being very different from that appearing in the several instances passed upon in the Dean, Fry and Dunnigan cases. It provides, "that defendant is hereby permitted to select * * * an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey, which has been or shall be made, of the U. S. not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, etc."

Act of Congress, approved Aug. 5, 1892, 27 Stat. 390.

Section 3 of the act referred to provides, that "in case the tract so selected shall at the time of the selection be unsurveyed, etc."

By adopting this language, it seems to me that the "selection" contemplated by Congress in the granting clause, Sec. 2, was the first list to be filed describing the land as nearly as possible without the guidance of a survey, and that it was not used in the nature of a "float" to be afterwards made perfect by the approval of the secretary of the interior.

If this be correct, the status of the land was established at
84 the time of the filing of the first list, and the land having been segregated from the public domain, the doctrine in Whitney *v.* Taylor, and H. & D. R. R. Co. *v.* Whitney, applies.

I see no reason why the conclusions of law should be modified.

SPOONER, *J.*

(Title of Cause.)

Judgment.

This cause came on regularly for trial on the 5th day of December, 1905, before the court at Grand Rapids, Minnesota; Thomas R. Benton, Esq., appearing as attorney for defendant, and John R. Donohue appearing as attorney *pro se* for the plaintiff.

The evidence in said case was introduced under a stipulation of facts filed herein, and the case was duly submitted to the court for consideration and decision; and after due deliberation thereon the court delivered its findings and decision in writing, which is filed herein, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law, the findings and order aforesaid, it is ordered, adjudged and decreed:

1st. That the plaintiff John R. Donohue is the owner of the premises in controversy in said action, viz: Lot 12 of Section 3, and Lots 9 and 10 of Section 4, Township 60, North of Range 24 West.

85 2nd. That the defendant has no right, title, lien or interest in or to said premises.

3rd. That said defendant holds the legal title from the United States government to said premises in trust for plaintiff.

4th. That the defendant shall within 10 days after the service upon it of a certified copy of the judgment herein, deliver to said plaintiff a deed duly executed by it, conveying said land to the plaintiff, John R. Donohue.

5th. That in case said defendant fails to execute and deliver the deed as hereinbefore ordered, then the judgment and decree entered herein, shall have all the force and effect of the deed provided for in the 4th paragraph of this decree, upon the recording and filing of a certified copy of this judgment and decree, in the office of the Register of Deeds, of said Itasca County, Minnesota.

6th. That the plaintiff have and recover his costs and disbursements from the defendant, hereby taxed at fifteen and 50-100 dollars.

Dated at Grand Rapids, Itasca County, Minn., this 24th day of August, 1906.

[District Court Seal.]

I. D. RASSMUSSEN,
Clerk of the District Court, Itasca County, Minn.

86 (Title of Cause.)

Notice of Appeal.

To John R. Donohue, the above named Plaintiff, and I. D. Rassmussen, Esq., Clerk of said District Court:

Please take notice that the above named defendant appeals to the Supreme Court of the State of Minnesota, from the judgment of the

said District Court made and entered herein in the office of the clerk of said court on the 24th day of August, 1906, and from the whole of said judgment.

Dated this 19th day of September, 1906.

THOS. R. BENTON,
Attorney for Defendant.

Bond on Appeal duly approved, served and filed.

87 STATE OF MINNESOTA:

Supreme Court.

JOHN R. DONOHUE, Plaintiff, Respondent,
vs.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, Defendant, Appellant.

Assignment of Errors in State Supreme Court.

The Court erred:

(1.) In finding that during the month of March, 1893, Jerry Hickey entered upon, took possession of and made settlement and improvements upon the land in controversy in this action, to-wit: Lot 12 of Section 3 and Lots 9 and 10 of Section 4, Township 60 N. Range 24 W.

88 (2.) In finding that said Jerry Hickey continued in possession and occupation of the land in controversy in this action by residing upon, cultivating and otherwise improving the same as a homestead in compliance with the homestead laws of the United States.

(3.) In finding that said Jerry Hickey had initiated a claim under the homestead laws to the land in controversy in this action prior to the defendant's application to select the same on December 31, 1895.

(4.) In finding that said Hickey's right and claim to the land in controversy in this action related back to the date of his alleged settlement on March 22, 1893.

(5.) In finding that the land in controversy in this action became segregated from the public lands and was not subject to defendant's selection by reason of the initiation of the claim of said Hickey and his settlement and other acts done on said land.

(6.) In holding that Bridget Hickey, mother and sole heir of Jerry Hickey, duly completed the homestead entry of said Hickey for the heirs of said Jerry Hickey.

(7.) In finding that the homestead entry made by the said Bridget Hickey was completed and in full compliance with the homestead laws of the United States.

(8.) In finding that upon the relinquishment by Bridget Hickey of all right, title and interest in and to the land embraced in the homestead entry made by her in the homestead application of said

Jerry Hickey, the land in controversy in this action became public lands of the United States and part of the public domain and subject to entry by the first legal applicant.

89 (9.) In finding that the plaintiff's stone and timber entry on the land in controversy in this action was cancelled through a mistake of fact and law on the part of the officials of the United States Land Department, and in finding that said entry was wrongfully and illegally suspended and wrongfully and illegally cancelled.

(10.) In finding that defendant and appellant was allowed to perfect its selection of the land in controversy in this action and that patent for said land was issued to this appellant through a mistake of fact and law on the part of the officials of the United States Land Department, and in holding that said patent was wrongfully and illegally issued to appellant and defendant.

(11.) In finding that the plaintiff is the equitable owner of the land in controversy in this action and that he is entitled to the legal title thereof.

(12.) In overruling appellant's motion to amend the conclusions of law herein.

(13.) In adjudging and decreeing that plaintiff is the owner of the land in controversy in this action.

(14.) In adjudging and decreeing that defendant has no right, title, lien, interest in or to the land in controversy.

(15.) In adjudging and decreeing that defendant holds the legal title to said land in trust for plaintiff.

(16.) In adjudging and decreeing the defendant to execute and deliver to plaintiff a deed conveying the said lands to plaintiff.

(17.) In adjudging and decreeing that in case defendant fails to execute its deed conveying said lands to plaintiff, the judgment in this action shall have the force and effect of a deed conveying said lands to plaintiff.

90 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1907.

TUESDAY MORNING, 9.30 O'CLOCK, *April* 30, *A. D.* 1907.

Court convened pursuant to adjournment. All the Justices being present.

Cal. No. 1. Reg. No. 14993.

JOHN R. DONOHUE, Respondent,

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was submitted to the Court for decision by appellant, on the Paper Books and Briefs, argued by respondent and taken under advisement.

A true record.

Attest:
C. A. PIDGEON, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:
C. A. PIDGEON, *Clerk.*

[Seal of the Supreme Court, State of Minnesota.]

91 [Endorsed:] 14993. State of Minnesota Supreme Court. Copy of minutes of argument. Filed June 22 A. D. 1907. C. A. Pidgeon, Clerk.

92 14993.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1907.

No. 1.

JOHN R. DONOHUE, Respondent,
v.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,
Appellant.

Syllabus.

Rights acquired by settlement and improvement upon unsurveyed land, duly and timely asserted, will, as against an intervening indemnity railroad selection, made under the act of Congress of August 5, 1892, be protected in its entirety, even though the lands claimed lie in different quarter-sections and the improvements of the settler are shown to be confined to a single quarter-section.

Lands within primary limits and lands within indemnity limits of a railroad land grant are both granted. One distinction between them is that as to lands within the primary limits the company's right attaches upon definite location, while as to lands within indemnity limits it does not attach until selection. A further distinction is that lands within the primary limit, when once excepted from the grant, remain in that condition, whereas, the status of indemnity lands at the date of selection determines the company's right at that time only, and such lands are subject to subsequent selection at any time at which they may be free.

93 A railroad grant does not attach to ordinary place lands if, at the time of the definite selection, the land has been sold, pre-empted, reserved or otherwise disposed of by the United States, while as to indemnity lands the status at the date of proffering or tendering selection should control the action of the local officers in allowing or rejecting the same during the pendency of prior adverse claim.

It may be within the authority of the Secretary of the Interior to permit such selection to stand and to give it his final approval upon failure of contestant to comply with the terms at his order deciding conditionally for the adverse claim. The exercise of this authority is not, however, to be extended so far as to enable the land office to give to the original selection of the railroad company the effect of filing a claim upon the land which, if the company does not see fit to withdraw it, will operate automatically to segregate the land for the railroad company's benefit for an indefinite period or until an adverse claim in existence at the time of such selection should be matured into a complete title or abandoned subsequently to compliance with the terms of the secretary's order.

In this case, at the time of selection of indemnity lands by the railroad company, a settler claimed anterior homestead rights. The contest between the conflicting claims resulted in an order by the secretary that upon the completion of entry by the heirs of the homesteader, the selection by the company would be cancelled. The heirs made the required affidavit and formal application and paid the money required by Sec. 2290, Revised Statutes of the
94 United States, and afterwards relinquished. Thereupon the plaintiff entered application to purchase the land under the stone and timber act. It is held:

(1.) The entry for this land by the heirs of the homesteader was completed. This operated to cancel the railway selection:

(2.) The subsequent abandonment of the homestead entry restored the land to the public domain and rendered it subject to disposition according to law as by the entry of this plaintiff.

(3.) That plaintiff's entry violated no principle of equity and was entitled to be given full legal effect.

Judgment affirmed.

95 14993.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1907.

No. 1.

JOHN R. DONOHUE, Respondent,
v.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, Appellant.

Opinion.

This is an appeal by the defendant and appellant railway company from the judgment entered by the district court of Itasca county decreeing that the plaintiff-respondent was the owner of certain lands in controversy, and that the defendant had no interest therein, but held the legal title from the United States Government to the premises in trust for the plaintiff, and granting relief to the plaintiff accordingly.

It appears from the stipulation of facts that on March 17, 1905, the Secretary of the Interior rendered a decision which recites the essential history of this case and sets forth its status at that time. That decision was as follows: "The Commissioner of the General Land Office.

SIR: The department has considered the motion filed by John R. Donohue for review of the decision of December 16, 1904,
96 affirming your office decision holding for cancellation the timber and stone land purchase made by him under the act of July 3, 1878 (20 Stat. 89), covering Lot 12 of Sec. 3, and lots 9 and 10 of Sec. T. 4, 60 N., R. 24 W., Cass Lake, Minnesota, land district, for conflict with the prior selection made of said land by the St. Paul, Minneapolis and Manitoba Railway Company, under the provisions of the act of August 5, 1892 (27 Stat. 390).

The tract in question was first selected December 31, 1895, by the St. Paul, Minneapolis and Manitoba Railway Company while the land was yet unsurveyed, and upon the filing of the township plat of survey July 22, 1896, the railway company filed its supplemental list of selections, conforming its previous selections to the line of the public survey. On the same day one Jerry Hickey tendered a homestead application for this and other land, alleging settlement thereon in March, 1893. This application was rejected and he appealed to your office, but before action was taken thereon he died, leaving his mother, Bridget Hickey, as his sole surviving heir. After his death your office ordered a hearing upon his allegation of settlement antedating the company's selection, and upon the record made at said hearing both your office and the local officers decided against the homestead claimant and in favor of the railway

company. The case was prosecuted on appeal to this department resulting in departmental decision of February 11, 1903, (32 L. D. 8). By that decision the concurring decisions of your office and the local officers were reversed and it was held that upon completion of entry by the heir of Hickey the company's selection would be canceled.

97 The present controversy between Donohue and the railway company is really a prolongation or extension of the original contest, for it seems that as soon as a favorable decision was secured upon the Hickey contest, original homestead entry was completed of the land and was immediately relinquished, whereupon Donohue tendered an application to purchase the land under the timber and stone act.

In the original decision in this case upon the Hickey contest, the department was moved to its conclusion because of those considerations that are often extended by this department and the courts in favor of the pioneer settler upon public lands. The case invoked by the department in reaching its conclusion was that of Tarpey *v.* Madsen (178 U. S. 215, 220), wherein it was said by that court: And in this respect we must notice the oft-repeated declaration of this court, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." Ard. *v.* Brandon, 156 U. S. 537, 543; Northern Pacific Railroad *v.* Amacker, 175 U. S. 564, 567. With this declaration, in all its ful-ness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire.

Had the real condition been then presented to the department, namely, that the land was not desired by the original settler and those dependent on and claiming through him but rather that such claim was being used merely for the purpose of avoiding a

98 selection in all respects regular and valid, to the end that a third party might at this late day initiate a claim to the land, a different conclusion would have been reached; in fact, the authority invoked would have supported such a conclusion.

The department cannot, therefore, under the circumstances hereinbefore detailed, accord to Donohue a superior claim under his application. It is unnecessary to specifically consider the technical questions sought to be raised in the motion now under consideration. Suffice it to say that the cases referred to have no application to the facts presented herein and upon a most careful consideration of the entire matter, the department adheres to its decision of December 16 last, and the motion for review is therefore accordingly denied and herewith returned to the files of your office relating to said case.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

On April 10, 1905, pursuant to this decision, Donohue's entry was cancelled on the files and records of the Land Department by the Commissioner of the General Land Office.

At some time in the month of June, 1905, the Secretary of the In-

terior approved the selection made by the Railway Company. On June 30, 1905, the patent of the United States was issued to said railway company conveying to said company, under the provisions of the said Act of August [illegible] and Lots 9 and 10 of Sec. 4 Twp. 60 N., R. 24 W.

99 Donohue never had nor claimed any interest in or to said land until after the relinquishment of the said homestead entry by Bridget Hickey and never had or claimed any interest whatever in said land except such as he may have acquired under and by virtue of his said stone and timber land entry. Donohue was the attorney for said Bridget Hickey in the proceedings before the Land Department of the United States hereinbefore mentioned.

JAGGARD, *J.*:

The first question presented by this appeal is whether as between the railway company and Jerry Hickey, the railway company had the better right. The railway company contends:

1st. That Hickey never took possession of, occupied, improved, settled or established a residence upon Lot 12 of Sec. 3, or Lots 9 or 10 of Sec. 4, Township 60 N., Range 24 W., the land in controversy herein, and never in any manner indicated an intention to claim said land under the homestead law until he filed his homestead application in July, 1896. 2d. That Hickey's admitted settlement, improvement, and occupation of Lot 15, Sec. 4, Town 60 N., Range 24 W., (Which is a part of the Southeast Quarter of Sec. 4) was not a settlement, improvement or occupation of the land in controversy (which lies in Section 3 and Northeast quarter of Section 4,) or any part thereof, within the meaning of the homestead law.

This controversy has been determined by the Secretary of the Interior in favor of the homesteader. Rights acquired by settlement and improvement upon unsurveyed land and duly and timely asserted upon filing of the plat of survey, will, as against an intervening indemnity railroad selection, made under the act of August 5, 1892, be protected in its entirety, even though the lands

100 claimed lie in different quarter-sections and the improvements of the settler are shown to be confined to a single quarter-section. Hickey *v.* St. P., M. & M. Ry. Co., 32 L. D. 8.

In so far as this decision found facts, it is conclusive upon this court. (Smelting Co. *v.* Kemp, 104 U. S. 636; Baldwin *v.* Stark, 107 U. S. 463; Gonzales *v.* French 164 U. S. 338). It is not here material how far we are bound by his conclusions concerning a question of law and fact. (See Marquiz *v.* Frisbie, 101 U. S. 475; O'Connor *v.* Gertens, 85 Minn. 81). We concur in its conclusions of law.

The second question in this case is whether Hickey's claim and the acts done by him or his heirs in furtherance thereof operated to segregate the land in question from the public domain and were a bar to the railway company's selection.

(1.) The railway company contends that until set aside and cancelled, its selection was an appropriation of the land which segregated it from the public domain and withdrew it from other

entry or disposition. In support of this proposition counsel quotes from Hastings &c. R. R. Co. *v.* Whitney, 132 U. S. 357, as follows: "In the light of these decisions, the almost uniform practice of the department has been to regard land upon which an entry of record valid upon its face has been made as appropriated and withdrawn from subsequent homestead entry, preëmption settlement, sale or grant, until the original entry be cancelled or declared forfeited." However, unintentionally, he has quoted only a part of a sentence entire in form and substance. The remainder of that sentence is:

", in which case the land reverts to the government as a part
101 of the public domain and becomes again subject to entry under the land laws." If the law of that case determines the present controversy, plaintiff must certainly prevail. There a homestead entry was held to segregate land from the public domain and to preclude its subsequent disposition as by an act of congress granting lands to a railway company. It cited and approved the holding in Ry. Co. *v.* Dunnemeyer, 113 U. S. 629, that upon subsequent abandonment of such homestead claim land thus segregated "passed back into the mass of public lands and was not brought within the grant." If the premises here involved were ordinary granted lands, there could be no controversy as to the plaintiff's right to prevail on this branch of the case. In Oregon &c. Ry. Co. *v.* U. S., 190 U. S. 186, 189, Mr. Justice Brown said: "That the railroad grant does not attach to lands which at the time of the definite location of the land have been sold, preëmpted, reserved or otherwise disposed of by the United States for any purpose, has been so often decided by this court as to be no longer open to question." The court then reviews in detail the facts and the opinions in a large number of the important cases. It would uselessly incumber this record to dwell on this point further.

(2.) The defendant, however, seeks to avoid this incontrovertible conclusion by showing that all the cases announcing it involved granted lands within place limits whereas the lands here in question were selected to supply deficiencies and were in lieu of other lands.

As to such lands, he insists, the right is a "float," and at-
102 taches on selection. The argument is that as to such lands, the existence of an entry or claim at the time the selection was proffered or tendered is not, if the claim or entry be afterwards abandoned, a bar to the completion and perfection of the selection and the acquisition of title to said lands by the railroad company. He carries the logic of the distinction to the point of insisting that the original selection operated to entitle the railroad company to lands upon which a homestead affidavit had been made, the land office fees and commissions paid, and a homestead entry made in accordance with Section 2290, of the Revised Statutes of the United States without further action by the railroad company.

That there is a distinction between granted and indemnity lands is not questioned. See Ryan *v.* Ry. Co., 98 U. S. 382; Wisconsin Central *v.* Price Co., 133 U. S. 496. We think, however, that neither the cases which defendant cites nor the distinction itself justify his conclusions in the abstract or its application to the facts in this case.

Its brief places emphasis on Oregon &c. Ry. Co. *v.* The U. S. 190 U. S., 186. There a settlement had been made 15 years before the selection of the lands in question as "lieu lands" under a railroad land grant. The land continued to be the property of the United States to which the railroad grant subsequently attached unless such grant was defeated by the fact that the donation notification still remained of record in the office of the attorney general. It was held that the railroad company was authorized to infer that the donee had abandoned the lands and that the lands were not reserved within the meaning of the granting act. The case at bar turns upon a controversy between an active present adverse claim, which it
103 is insisted matured into a definite equitable interest, and the railroad selection.

Our attention has been called also to some decisions of the land department which properly involve discussion. Those decisions are not binding, but are entitled to great respect. Lamar, J., in Hastings &c. R. R. Co. *v.* Whitney, 10 S. C. R., 112, 115. "The construction given to a statute by those charged with the duty of executing it is always entitled to most respectful consideration and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws that they are afterward called upon to interpret." U. S. *v.* Moore, 95 U. S., 760, 763.

The first of these cases is Northern Pacific R. R. Co. *v.* Dean, 27 L. D. 462. At page 463 of that decisions it is said: "Reference was made to the decision in Southern Pacific R. R. case, 21 L. D. 423, wherein it was said: "The lands within the primary and indemnity limits are both granted, the particular difference between the two being the time of the attachment of rights. Within the primary limits, the company's right attaches upon definite location, while within indemnity limits it does not attach until selection. But any claims that would serve to prevent the attachment of right under the grant to a tract within the primary limits, because existing at the date of definite location, would, by parity of reasoning, if existing at the date of selection of indemnity land, serve as a bar to the acceptance of such selection." While adhering to the views thus quoted a further distinction might be pointed out between
104 lands within the primary and indemnity limits, *i. e.*, that the former, when once excepted from the grant, remain in that condition, whereas as to the latter, the status of the land at the date of selection determines the company's right at that date only. That is to say, indemnity lands are subject to selection at any time when they are free." That case in the first place recognized the right of the railway company to make entry upon indemnity lands at any time at which they are free from entry. That is, in this case, if the railway company had again selected the land after the relinquishment of the homestead right and before Donohue's entry, it would have acquired a superior right. In the second place that case sustained the practice of the land office in holding the company's selection subject to the right of the applicants to complete their claims.

When they failed to respond upon notice, and in effect abandoned their applications, the anterior selection of the railroad company was given effect. Such a holding applied to the facts in the present case, justifies the practice of the land office in treating the selection of the railway company as suspended until it was determined whether the homestead entry should be completed or not. Upon its completion, inferentially, the ordinary rule would apply and the railroad company would have no right to the premises which would then become a part of the public domain. Upon failure to complete the entry, the railway selection would become effective.

In Northern Pacific *v.* Fly, 27 L. D. 464, the substance of the opinion was that while "the status at the date of proffering or
105 tendering selection (of indemnity lands by a railroad company) should control the action of the local officers in rejecting the same or allowing it to go on record during the pendency of a prior adverse claim, it is within the authority of the secretary to permit such selection to stand and to give it his final approval upon the subsequent abandonment or other elimination of the adverse claim. This results from the fact that a railroad indemnity selection does not become finally effective until approved by the secretary and if at that time the land is free and the company is entitled to indemnity, the fact that there was an adverse claim when the selection was proffered or tendered constitutes no legal obstacle to the secretary's approval under the law."

The decision held that upon the completion of the entry, by the prior adverse claimant "the company selection will be cancelled." The reason for this grew out of the fact that many years had elapsed since that claimant had tendered his application and it might have been that he had abandoned his claim to the land and was otherwise unable to complete it. The decision therefore amounted to a holding that "the fact that such land is at one time not free and therefore not then subject to selection does not preclude its subsequent selection. * * * The selection stands of record subject to the perfection of the adverse claim." To apply the reasoning of the case to the one at bar, the question is what is "the perfection of the adverse claim." In the Fly case, as in the present case, that was the completion of the entry and not the acquisition of a title. The claimant in the
Fly case failed to complete his entry and therefore lost his
106 interest. By a parity of reasoning in the present case if Hickey or his heirs failed, not to acquire a patent, but to complete the homestead entry then the railway company would have been entitled to the land.

In Dunnigan *v.* The N. P. R. R. Co., 27 L. D. 467, Dunnigan resided on the land and made improvements. It does not appear that he was qualified to make homestead entry thereon or that he ever applied to enter the land. It was very properly held that whatever interest he had was personal and was not transferable. In the case at bar the plaintiff does not claim through any succession to the interest of the original homesteader.

(3.) These decisions do not give to the original selection of the railroad company the effect of filing a claim upon the land, which,

if the company does not see fit to withdraw it, will operate automatically to segregate the land for the railroad company's benefit for an indefinite period or until an adverse claim in existence at the time of such selection should be matured into a complete title or abandoned subsequently to compliance with the secretary's order. The defendant is entitled to no such option or preference. A "float" does not mean a cloud on title hovering over indemnity lands once selected by a railway company. The logic of these opinions and of the distinction itself may justify the conclusion that the selection of the railway company may be permitted to stand and may receive the final approval of the secretary in case the person asserting the adverse right has failed to comply with the terms of the decision of the controversy by the department in accordance with Congressional legislation; but it justifies no more.

107 In the first place the mere selection of the lands by the railway company conferred upon it no title in equity or otherwise. The approval of the secretary was essential to the efficacy of the selection. * * * His action in that matter was not ministerial but judicial." Mr. Justice Field in Wis. Cent. R. R. Co., 10 S. C. R. 341, at p. 345. The rights of the railway company were determined by his order. The terms of that order suspended its right until the homestead entry should or should not be completed. They are not to be distorted into securing a further suspension until the homesteader had not only completed his entry in accordance with its terms but also had taken further steps not referred to in that order nor required by it. The decision of the land department was *res adjudicata* as to the rights of the railway company.

In the second place the order could not legally have given the defendant's selection the effect of a lien or claim surviving the completion of the adverse homestead entry and operating in defendant's favor as a sort of "shifting use" in case of subsequent abandonment or relinquishment of the homestead right. This is obvious from its mere statement and is clear upon authority.

The railway company's right to the land could not have been held in definite abeyance to await the subsequent default of the settler. Perkins *v.* Central P. R. R. Co., 1 L. D. 357. The language of Mr. Justice Miller in Kansas & P. R. Co. *v.* Dunnemeyer, 113 U. S. 629 is apt. "Did Congress intend to say that the right of the company also attaches and whichever proved to be the better

108 right should obtain the land? It is not conceivable that Congress intended to place these parties (homestead and preemption claimants on the one hand and railway companies on the other) as contestants for the land with the right in each to require proof from the other of complete performance of his obligation. Least of all is it to be supposed that it was intended to raise up in antagonism, to all actual settlers on the soil whom it had invited to its occupation, this great corporation, with the interest to defeat their claim and to come between them and the government as to the performance of their obligation."

The action of the Land Department cannot override the express will of Congress or convey any lands in disregard or defiance thereof,

When they failed to respond upon notice, and in effect abandoned their applications, the anterior selection of the railroad company was given effect. Such a holding applied to the facts in the present case, justifies the practice of the land office in treating the selection of the railway company as suspended until it was determined whether the homestead entry should be completed or not. Upon its completion, inferentially, the ordinary rule would apply and the railroad company would have no right to the premises which would then become a part of the public domain. Upon failure to complete the entry, the railway selection would become effective.

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108 right should obtain the land? It is not conceivable that Congress intended to place these parties (homestead and preemption claimants on the one hand and railway companies on the other) as contestants for the land with the right in each to require proof from the other of complete performance of his obligation. Least of all is it to be supposed that it was intended to raise up in antagonism, to all actual settlers on the soil whom it had invited to its occupation, this great corporation, with the interest to defeat their claim and to come between them and the government as to the performance of their obligation."

The action of the Land Department cannot override the express will of Congress or convey any lands in disregard or defiance thereof,

Brufening *v.* Chicago, Milwaukee & St. Paul Ry. Co., 163 U. S. 326. That is, however, the logical result of defendant's contention. The railway company's lists were made under the act of Aug. 5, 1892, by the terms of which the Manitoba company, in lieu of its relinquishment of other lands to which it had been held by the courts to be entitled, but which the United States had disposed of in disregard of the railroad claim, was granted a right to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of making of such selection. Moreover, under Section 2297 of the Revised Statutes it is provided that upon a change of residence, or abandonment as therein mentioned before the expiration of the five years "then and in that event shall revert to the government." When the homestead entry on public lands has been made by a settler the
109 lands so entered cannot, while such entry stands, be set apart for an authorized public purpose, even prior to the completion of the full title of the settler. Upon entry in favor of the settler a right attaches to the land which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions in the event of which he becomes vested with a full and complete ownership. Fuller, C. J., in Sturr *v.* Beck, 10 S. C. R. 350, at p. 353; 133 U. S., 541; approving a celebrated opinion by Attorney General MacVeagh.

A number of authorities tend to sustain this conclusion more or less specifically. In State of California *v.* Southern Pacific Ry. Co., 27 L. D. 542, the railway company's indemnity selections were noted on the books of the land office but were rejected because they conflicted with a timber culture entry. The railroad company appealed; pending the appeal, the state secured a relinquishment from the claimant and immediately filed it and then made selection of the land for itself. It was held that the record of the timber culture entry was a bar to the selection under the railroad grant; that the rejection of the company's indemnity list was proper; and that the company gained nothing by the appeal. See also Ardvard *v.* Brandon, 156 U. S. 567; U. S. *v.* Turner, 54 Fed. 228; De Lacy *v.* N. P. R. Co. 72 Fed. 726; Burlington R. Co. *v.* Aburk, 15 N. W. 317; Prince Invt. Co. *v.* Ehein, 55 Minn. 36; St. Paul & C. R. Co., *v.* Ward, 47 Minn. 40.

110 (4.) The substance of the controversy in this case in the view here taken, depends upon what was done under the order of the Secretary of the Interior, viz: "Upon the completion of entry of this land by the heirs of Hickey the selection by the company as to the lands here in question will be cancelled." Defendant contends that an entry comforming merely to Sec. 2290 of the Revised Statutes is not a completed entry but that residence and cultivation and proof required by Section 2291 are essential thereunto. The reasonableness of this argument is not apparent.

The admitted facts show, and the department found, a completion of the entry. The Secretary on December 16, 1904, held that: "The cancellation of the company's entry was rightfully withheld awaiting the action of the heir of Bridget Hickey. * * * Instead of making completion of entry it appears that she filed a new application as heir, and made an original entry on the land. This was not contemplated in the departmental decision or necessary, and it must be held that upon the relinquishment of said entry by Bridget Hickey, the rights of the company under this selection which was still pending, attached, and the entry of Donohue should not have been allowed." This holding was reversed on March 17. It was then found as a fact that "as soon as a favorable decision was secured upon the Hickey contests, the original homestead entry was completed on the land."

Whether this be regarded as binding upon this court as a finding of fact or of mixed fact and law or not is not material. For the record shows that the Hickey heirs (1) made an affidavit setting forth the facts entitling them to make entry; (2) they also made a formal application; (3) they also paid the money required.
111 "When these three requisites were complied with the land was entered." Hastings &c. Ry. Co. *v.* Whitney, 133 U. S. 257; Choteau *v.* Pope, 12 Wheat. 586; Sturr *v.* Beck, 10 S. C. R. 351 accords, in our opinion; notwithstanding defendant's argument to the contrary. See also Gilbur *v.* Spearing, 4 L. D. 463; Eddings *v.* Burns, 8 L. D. 226.

(5.) The conclusions reached on this, the principal branch of this case, are as follows: The homestead entry was completed in accordance with the order of the land department. That operated as a matter of law, to cancel the railroad selection. N. P. R. R. Co. *v.* Reed, 27 L. D. 651. The legal effect of the original selection ceased as to the land here in question. To the railroad company was restored its right to select the same quantity of land from the public domain available for that purpose. The homestead entry was abandoned or relinquished. That operated to pass the land back to the public domain and to subject it to disposition according to law. The railroad company might then have selected it; or Donohue might have made entry, as he did, or anyone else might have asserted a claim as permitted by Congress. Priority of right between such claimants would be determined by priority of record of selection entry or claim.

The third question presented by the assignments of error is "whether plaintiff's action should have been dismissed for want of equity." It is not material what the department would have done had it known of the facts in connection with Donohue's entry. The question on that point before it and before us was purely one of law. In the view here taken, Donohue should have prevailed because he exercised his legal right to make an entry and be-
112 cause the railroad company failing so to do, relied without justification upon a selection which had ceased to be of legal force and upon an order which had become *functus officio*. No principle of equitable jurisprudence was considered or applied by the

department; nor was it involved. No investigation was made nor should have been made, as to equity used in a colloquial sense. If Donohue's good faith was relevant, it should have been made the subject of judicial inquiry and not of personal conjecture. That we are satisfied his action was in the protection of the interests of the Hickey heirs is as wholly immaterial to the merits of the controversy as the impression of the land department at a great distance from the scene of the controversy that the land was not desired by the original settlers and those dependent on and claiming through them.

Judgment affirmed.

JAGGARD, *J.*

113 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1907.

No. 1.

JOHN R. DONOHUE, Respondent,
vs.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, Appellant.

Appeal from District Court, Fifteenth Judicial District, County of Itasca.

This cause having been duly argued and submitted at the General April Term of this Court, A. D. 1907, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that the Respondent above named have judgment accordingly.

Entered June 22, A. D. 1907.

By the Court,

Attest:

C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgement entered in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, *Clerk.*

114 [Endorsed:] No. 14993 State of Minnesota Supreme Court. Copy of order for judgment. Filed June 22, A. D. 1907. C. A. Pidgeon, Clerk.

115 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1907.

No. 1.

JOHN R. DONOHUE, Respondent,
vs.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause, on the 22d day of June A. D. 1907.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court of the Fifteenth Judicial District, sitting within and for the County of Itasca be and the same hereby is in all things affirmed, And it is further determined and adjudged that the Respondent above named, do have and recover of said St. Paul, Minneapolis & Manitoba Railway Company, Appellant, herein the sum and amount of eighty-four and 00/100 dollars ($84.00) costs and disbursements in this cause in this Court, and that said Respondent have execution for the enforcement thereof.

Dated and signed this 22d day of June, A. D. 1907.

By the Court.

Attest:

C. A. PIDGEON, *Clerk.*

Statement for Judgment.

Costs allowed by Statute	$25.00
Clerk's Fees, for making Return	
Printer's Fees	48.00
Clerk's Fees, Supreme Court	11.00
Filing Mandate	
Affidavits and Acknowledgments	
Postage	
	$84.00

116 [Endorsed:] State of Minnesota, Supreme Court. Transcript of Judgment. Filed June 22 A. D. 1907. C. A. Pidgeon, Clerk.

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining

of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the city of St. Paul, this 22nd day of June A. D. 1907.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

117 UNITED STATES OF AMERICA, *State of Minnesota:*

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The petition of The Saint Paul, Minneapolis and Manitoba Railway Company respectfully shows that on the 22nd day of June A. D. 1907 the Supreme Court of the State of Minnesota rendered a final judgment against your petitioner, in a certain case wherein John R. Donohue was plaintiff and your petitioner was defendant, as will appear by reference to the record and proceedings in said cause; and that said Court is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, because there was therein drawn in question the construction of a statute of the United States and the decision was against the right and title specially set up and claimed by this petitioner under said statute, as appears by the record of the proceedings in said cause which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable in the Supreme Court of the United States and for citation and supersedeas and your petitioner will ever pray, etc.

THE SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.
ROME G. BROWN, *Attorney for Petitioner.*

Let the writ of error issue as prayed.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

Dated July 29th, A. D. 1907.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between John R. Donohue, plaintiff, and The

Saint Paul, Minneapolis and Manitoba Railway Company, defendant, wherein was drawn in question the construction of a statute of the United States and the decision was against the right or title specially set up or claimed by said defendant under said statute; a manifest error hath happened to the great damage of the said The Saint Paul, Minneapolis and Manitoba Railway Company as by its complaint appears. We being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same at Washington on *the* Wednesday, August 28th, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court the 29th day of July in the year of our Lord one thousand nine hundred and seven.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States for the District of Minnesota.
By LOUISE B. TROTT, *Deputy.*

Allowed by

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

119 United States of America to John R. Donohue, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein The Saint Paul, Minneapolis and Manitoba Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota, this 29th day of July in the year of our Lord one thousand nine hundred and seven.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

Due service of the above citation by copy thereof is hereby admitted this 29th day of July A. D. 1907.

J. R. DONOHUE,
Defendant in Error.

120 The Supreme Court of the State of Minnesota.

JOHN R. DONOHUE, Plaintiff and Respondent,

vs.

THE SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, Defendant and Appellant.

Now comes the said defendant and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above entitled matter, there is manifest error in this, to-wit:

1. That the Court in and by said judgment held that the homestead right of Jerry Hickey had attached or been initiated to the land in controversy in said action prior to the selection of said land by said defendant under an act of Congress approved August 5, 1892;

2. That the Court in and by said judgment held that the land in controversy became segregated from the public lands by reason of the said initiation of the claim of said Hickey and was not subject to said defendant's selection under said Act of Congress;

3. That the Court in and by said judgment held that the heirs of said Jerry Hickey duly completed the homestead entry of said Hickey and that such completion operated to cancel defendant's selection under said Act of Congress;

121 4. That the Court in and by said judgment held that upon the relinquishment by the heirs of said Jerry Hickey of all right, title and interest in and to the land embraced in the homestead entry made by said heirs the land in controversy became public land of the United States and part of the public domain and subject to entry by the first legal applicant;

5. That the Court in and by said judgment held that said plaintiff's stone and timber entry of the land in controversy was canceled through a mistake of fact and law on the part of the officers of the United States Land Department and that said entry was wrongfully and illegally suspended and wrongfully and illegally canceled;

6. That the Court in and by said judgment held that the patent for said land issued to defendant under provisions of said Act of Congress of August 5, 1892 was wrongfully and illegally issued to said defendant through a mistake of law and fact on the part of the officers of the United States Land Department;

7. That the Court in and by said judgment held that said plaintiff is the equitable owner of said land and that he is entitled to the legal title thereof and that defendant has no right, title, lien or interest in or to said land.

8. That the Court in and by said judgment held that defendant

holds the legal title to said land in trust for plaintiff and adjudged and decreed said defendant to execute and deliver to plaintiff a deed conveying said land to plaintiff.

THE ST. PAUL, MINNEAPOLIS AND
MANITOBA RAILWAY COMPANY,
By ROME G. BROWN, *Its Attorney.*

Dated, 29th July, A. D. 1907.

122 Know all men by these presents, that The Saint Paul, Minneapolis and Manitoba Railway Company, a corporation of the State of Minnesota, as principal, and Robert I. Farrington and Charles H. Babcock, as sureties, are held and firmly bound unto John R. Donohue, of the County of Ramsey, State of Minnesota, in the sum of One Thousand Dollars ($1,000.00), to be paid to the said obligee, his heirs, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of July A. D. 1907.

Whereas, lately, in the Supreme Court of the State of Minnesota, in a suit pending in said Court between John R. Donohue, plaintiff, and The Saint Paul, Minneapolis and Manitoba Railway Company, defendant, judgment was rendered against said defendant and said defendant hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the aforesaid suit.

Now therefore, the condition of this obligation is such that if the above named defendant, The Saint Paul, Minneapolis and Manitoba Railway Company, shall prosecute its said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE SAINT PAUL, MINNEAPOLIS AND
MANITOBA RAILWAY COMPANY,
[CORP. SEAL.]
By ROBT. I. FARRINGTON,
Second Vice President.
ROBT. I. FARRINGTON. [SEAL.]
CHARLES H. BABCOCK. [SEAL.]

Signed, Sealed and Delivered in Presence of
JAMES STODDART.
J. A. BUCKLEY.

123 STATE OF MINNESOTA, *County of Ramsey, ss:*

On this 26th day of July A. D. 1907 before me appeared Robert I. Farrington, to me personally known, who, being by me duly sworn did say that he is the Second Vice President of The Saint Paul, Minneapolis and Manitoba Railway Company, a corporation organized and existing under the laws of the State of Minnesota, and

described in the foregoing instrument, that the seal affixed to said instrument is the seal of said corporation and that said instrument was executed in behalf of said Company by authority of its Board of Directors, and said Robert I. Farrington acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] JAMES STODDART,
Notary Public, Ramsey County, Minnesota.

My commission expires June 21st, 1911.

STATE OF MINNESOTA, *County of Ramsey, ss:*

On this 26th day of July A. D. 1907 before me personally appeared Robert I. Farrington and Charles H. Babcock, to me known to be the persons described in and who executed the foregoing bond and acknowledged the same as their free act and deed.

[SEAL.] JAMES STODDART,
Notary Public, Ramsey County, Minnesota.

My commission expires June 21st, 1911.

I hereby approve the foregoing bond and sureties this 29th day of July A. D. 1907.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

124 STATE OF MINNESOTA:

Supreme Court.

Return of Clerk of Supreme Court of Minnesota on Writ of Error.

STATE OF MINNESOTA,
Office of Clerk of Supreme Court, ss:

I, C. A. Pidgeon, Clerk of the Supreme Court of the State of Minnesota, do hereby, in obedience to the writ of error herein issued, certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment roll and all of the proceedings had in the said Supreme Court of the State of Minnesota, in the case between John R. Donohue, Respondent, *vs.* St. Paul, Minneapolis & Manitoba Railway Company, Appellant, including the opinion of the said Supreme Court filed upon the hearing in which the judgment herein was rendered, also a true and correct copy of the assignments of error filed by appellant in said State Supreme Court upon the hearing upon which final judgment was rendered.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing is a true

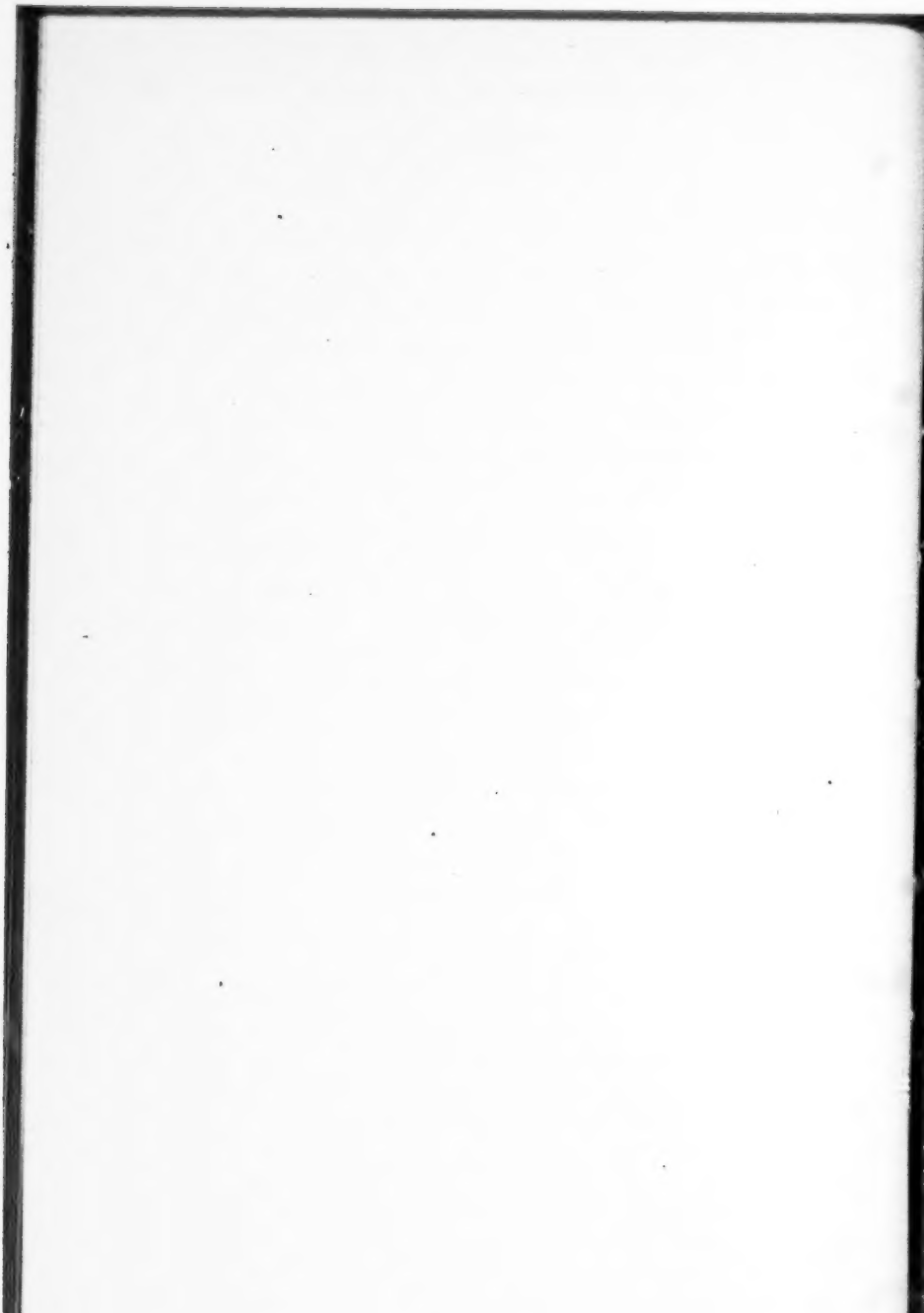
and correct copy of the original petition for writ of error, with allowance of same, and also of the assignments of error presented and filed with said petition for writ of error, including petition for reversal, and also of bond on writ of error with approval of same, as the same remain on file and of record in said Supreme Court of the State of Minnesota, and also the original writ of error from the Supreme Court of the United States, with allowance of same, and the citation issued thereon, with proof of service thereon, and on each of the same endorsed, and that the foregoing constitutes a true, full and complete return on said writ of error.

In witness whereof, I have hereunto set my hand and the seal of the said Supreme Court of the State of Minnesota, at the Capitol at St. Paul, Minnesota, this 8th day of August, 1907.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON,
Clerk of the Supreme Court of Minnesota.

Endorsed on cover: File No. 20,843. Minnesota supreme court. Term No. 440. The Saint Paul, Minneapolis & Manitoba Railway Company, plaintiff in error, *vs.* John R. Donohue. Filed September 3d, 1907. File No. 20,843.



United States Supreme Court.

OCTOBER TERM, 1907.

No. 440.

THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,

Plaintiff in Error,

vs.

JOHN R. DONOHUE,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action involves the title to 120 acres of land in Sections 3 and 4, Township 60 North, Range 24 West, Itasca County, Minnesota, and arises in the following manner:

During the year 1893 one Jerry Hickey, who was a citizen of the United States and possessed the qualifications prescribed by the homestead laws entered upon, took possession of and made settle-

ment and improvements upon a tract of vacant unsurveyed public land, which on survey was found to be in Township 60 N., Range 24 W., Itasca County, Minnesota. Hickey continued in possession and occupation of the tract so settled upon, erected a dwelling house thereon and resided upon, cultivated and improved said tract from the time of his settlement until his death.

On December 31, 1895, the St. Paul, Minneapolis and Manitoba Railway Company, the plaintiff in error herein (which for the sake of brevity will be hereinafter called the Railway Company), filed in the United States District Land Office at Duluth, Minnesota, its application to select certain unsurveyed lands in said unsurveyed Township 60 N., Range 24 W., under the provisions of the Act of Congress approved August 5, 1892, entitled, "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota." Said Railway Company duly paid to the Receiver of said Land Office the legal fees for such selection and its selection *was accepted and filed by the district land officers and noted on their records.*

The official plat of the survey of Township 60 N., Range 24 W., was filed in the United States Land Office at Duluth, Minnesota, July 22, 1896. On that day Hickey presented to the district land officers an application to enter Lot 12 of Section 3 and Lots 9, 10, 14 and 15 of Section 4, said Township, under the homestead laws of the United States, alleging settlement on said lands on March 22, 1893. The district land officers rejected

Hickey's application for the reason that the same conflicted in part with the application of the Railway Company. Hickey thereupon appealed to the Commissioner of the General Land Office.

When Township 60 N., Range 24 W., was surveyed it was found that Lot 12 of Section 3 and Lots 9 and 16 of Section 4 thereof were a part of the lands included in the Railway Company's selection filed in the district land office December 31, 1895. On July 22, 1896, the Railway Company filed in the district land office its supplemental selection list adjusting its selection of December 31, 1895, to the lines of the government survey as required by Section three of said Act of August 5, 1892. The district land officers refused to receive said list because the same conflicted with Hickey's homestead application. The Railway Company thereupon appealed to the Commissioner of the General Land Office.

Hickey died some time in the month of March, 1897, leaving as his sole heir his mother Bridget Hickey, who was a citizen of the United States and resided at Calais, Maine.

By direction of the Commissioner of the General Land Office, dated October 12, 1901, a hearing was had before the district land officers at Duluth, after notice to Bridget Hickey and the Railway Company for the purpose of determining whether Hickey had made a settlement and established his residence under the homestead law prior to and at the time of the Railway Company's selection.

On the testimony taken at said hearing the

district land officers held that Hickey's settlement and improvements were confined to Lot 15, Section 4, Township 60 N., Range 24 W. They, therefore, rejected his homestead application as to Lot 12 of Section 3 and Lots 9 and 10 of Section 4, said Township and Range, because the same conflicted with the Railway Company's selection thereof. On appeal the decision of the district land officers was affirmed by the Commissioner of the General Land Office. On further appeal the decision of the Commissioner was reversed by the Secretary of the Interior who held that Hickey had initiated a claim to all the land embraced in his application prior to the selection thereof by the Railway Company and that upon completion of entry for the land by Hickey's heirs the Railway Company's selection would be canceled.

June 4, 1903, Bridget Hickey filed in the district land office at Duluth, Minnesota, homestead application in lieu of the application theretofore filed by Jerry Hickey, which had been lost, made the homestead affidavit required by Section 2290, Revised Statutes of the United States, paid the fees and commissions required by said Section, and was allowed to make and did make the homestead entry described in said Section 2290 for all the land embraced in the application of Jerry Hickey.

Bridget Hickey did not at any time make the final proof required by Section 2291, Revised Statutes of the United States, and the district land officers never issued the final homestead entry certificate mentioned and described in said Section 2291.

On July 1, 1903, the land in controversy was transferred from the Duluth Land District to the Cass Lake Land District in the State of Minnesota, and on July 2, 1903, Bridget Hickey filed in the Cass Lake office her relinquishment to the United States of all her claim, right, title and interest in and to the land embraced in the application of Jerry Hickey and in the homestead entry made by her.

On the same day, July 2, 1903, John R. Donohue, the defendant in error herein, filed in Cass Lake office his application to enter said land under the Act of Congress approved June 3, 1878, entitled, "An Act for the sale of timber lands in California, Oregon, Nevada and in Washington Territory" and acts amendatory thereof, and on October 12, 1903, made the proofs required by said Act, paid the purchase price of said land and the land office fees and commissions. His proofs were accepted by the district land officers and he was allowed to make and did make entry of said lands under said Act.

On February 18, 1904, the Commissioner of the General Land Office canceled the homestead entry of Bridget Hickey, pursuant to the relinquishment thereof and directed the district land officers at Cass Lake, Minnesota, to notify the Railway Company to perfect its selection of Lot 12, Section 3 and Lots 9 and 10 of Section 4, Township 60 N., Range 24 W., and on March 25, 1904, suspended Donohue's entry for conflict with said selection.

The Railway Company completed the adjustment of its selection of said land to the lines of the pub-

ne' surveys as required by the Act of August 5, 1892, and on July 22, 1904, the Commissioner held Donohue's entry of said land for cancellation for conflict with said selection. The Commissioner's decision was affirmed by the Secretary of the Interior on appeal and a motion for the review of the Secretary's decision was denied by the Secretary on March 17, 1905.

Pursuant to said decisions Donohue's entry was on April 10, 1905, cancelled by the Commissioner of the General Land Office so far as it conflicted with the railway selection. During the month of June, 1905, the Railway Company's selection of Lot 12 of Section 3 and Lots 9 and 10 of Section 4, Township 60 N., Range 24 W., was approved by the Secretary of the Interior, and on June 30, 1905, the patent of the United States was issued to said Railway Company under said Act of August 5, 1892.

Donohue was the attorney for Bridget Hickey in the proceedings before the Land Department of the United States.

Thereafter Donhue filed his complaint in the nature of a bill in equity in the District Court for Itasca County, State of Minnesota, against the Railway Company to have the said Company decreed to hold the title in trust for and to convey to him. The case was tried to the Court without a jury, and was submitted upon the pleadings and a stipulation of facts.

The District Court held that by his settlement Jerry Hickey had initiated a claim to all land

embraced in his homestead application which was a bar to the Railway Company's selection; that upon the relinquishment and cancellation of the entry made by Hickey's heir the land was restored to the public domain and became subject to entry by Donohue under the timber and stone land law. Judgment was accordingly entered for Donohue, the plaintiff below, that he was the owner of the lands described in the complaint, that the defendant had no right, title or interest therein and that defendant held the legal title in trust for said plaintiff and should convey to him. On appeal to the Supreme Court of the State of Minnesota the judgment of the District Court was affirmed, whereupon the case was brought to this Court by writ of error.

SPECIFICATION OF ERRORS.

We allege that the Supreme Court of the State of Minnesota erred in this, to-wit:

1. In holding and adjudging that the homestead right of Jerry Hickey had attached or been initiated to the land in controversy prior to the selection of said land by The St. Paul, Minneapolis and Manitoba Railway Company, plaintiff in error herein, under the Act of Congress approved August 5, 1892.

2. In holding and adjudging that the land in controversy became segregated from the public lands by reason of the initiation of the claim of said Hickey and was not subject to plaintiff in error's selection under said Act of Congress.

3. In holding and adjudging that the heir of said Jerry Hickey duly completed the homestead entry of said Hickey and that such completion operated to cancel plaintiff in error's selection under said Act of Congress.

4. In holding and adjudging that upon the relinquishment by the heirs of said Jerry Hickey of all their right, title and interest in and to the land embraced in the homestead entry made by said heirs the land in controversy became public land of the United States and subject to entry by the first legal applicant.

5. In holding and adjudging that defendant in error's stone and timber entry of the land in controversy was canceled through a mistake of fact and law on the part of the officers of the United States Land Department and that said entry was wrongfully and illegally canceled.

6. In holding and adjudging that the patent for said land issued to plaintiff in error under the provisions of said Act of Congress of August 5, 1892 was wrongfully and illegally issued through a mistake of law and fact on the part of the United States Land Department.

7. In holding and adjudging that defendant in error is the equitable owner of said land, that plaintiff in error has no right, title or interest therein and that plaintiff in error holds the legal title to said land in trust for defendant in error.

ARGUMENT.

The Supreme Court of the State of Minnesota held:

1. That Jerry Hickey had, prior to the Railway Company's selection of the land in controversy, initiated a claim to said land under the homestead law.

2. That the homestead entry of the land in controversy was completed by the heirs of Hickey and that this entry operated to cancel the Railway Company's selection.

3. That upon the relinquishment of said homestead entry the land included therein was restored to the public domain and became subject to entry by the first legal applicant and to entry by Donohue under the timber and stone law.

I.

THE RIGHT OF JERRY HICKEY UNDER THE HOMESTEAD LAWS OF THE UNITED STATES HAD NOT ATTACHED OR BEEN INITIATED TO THE LAND IN CONTROVERSY PRIOR TO AND AT THE TIME OF THE SELECTION OF SAID LAND BY THE RAILWAY COMPANY UNDER THE ACT OF CONGRESS APPROVED AUGUST 5, 1892.

This proposition rests upon two grounds:

First, that Hickey never took possession of, occupied or improved, settled or established a residence upon the lots in controversy herein, or either of them, and never in any manner indicated an intention to claim said lots, or either of them, under

the homestead law or otherwise until he filed his homestead application in July 1896, which was after the Railway Company's selection of said lots.

Second, that Hickey's settlement upon and occupation and improvement of Lot 15, Sec. 4, Twp. 60 N., R. 24 W., which is a part of the southeast quarter of said Section 4, was not a settlement upon or occupation or improvement of the land in controversy which lies in Section 3 and in the northeast quarter of Section 4, or any part thereof.

1. *Jerry Hickey never in fact settled or resided upon, occupied or improved, or in any manner indicated an intention to claim the land in controversy under the homestead law, or otherwise, prior to the selection thereof by the Railway Company.*

The case was submitted to the District Court of the state upon a stipulation of facts which included copies of the decisions of the officers of the Land Department. No other evidence whatever was introduced. The Court found that all the matters contained in this stipulation are true. It is stipulated (Record, page 13, original 26) that in 1893 Hickey settled upon, occupied and improved a tract of land in unsurveyed Township 60 N., Range 24 W., but the tract settled upon is not described or identified by the stipulation. The fact of Hickey's settlement and occupation was, however, put in issue in the Land Department and a hearing before the District Land Officers was ordered by the Commissioner of the General Land Office to determine that question. On the evidence taken at this hearing the District Land Officers held:

> "But the fact is that Lot 12 of Section 3 and Lots 9 and 10 of Section 4 are entirely outside of the technical quarter section and government subdivision upon which Hickey had his improvements, to-wit: his house, his well and

his clearing. *The record will be searched in vain for any evidence showing or tending to show that Hickey made any improvements whatever on the descriptions of land just set out. No notice appears to have been posted, buildings erected, no lines blazed on or around said tracts.*"

Record, pages 15 and 16, Original 31.

The Commissioner of the General Land Office on appeal held that Hickey's improvements were confined to Lot 15 of Section 4. Upon appeal to the Secretary of the Interior, the Secretary, upon the facts found by the District Land Officers and the Commissioner, held that Hickey's settlement and improvements upon the land in S. E. ¼ Section 4 was in legal effect a settlement upon all the lands embraced in his homestead application, including the land in controversy. This is the only evidence in the record touching the fact of Hickey's settlement and occupation of the land in dispute and it conclusively shows that at the time of the Railway Company's selection he had not in fact settled upon, occupied or improved the land embraced in the selection, or in any manner indicated an intention to claim the same under the homestead law, or otherwise.

2. *Hickey's settlement, improvement and occupation of Lot 15 of Section 4, was not a settlement, improvement, or occupation of the land in dispute and was not a bar to the Railway Company's selection of the latter.*

The Act of August 5, 1892 (27 Stat. 390) under which appellant claims, gives to the St. Paul, Minneapolis and Manitoba Railway Company the right to select, in lieu of certain lands reconveyed by it to the United States, an equal quantity of non-mineral lands "not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such

In Staples v. Richardson, 16 L. D., 248, the Secretary says:

> "No doctrine is better settled than that the notice given by settlement and improvement extends only to the technical quarter section upon which they are located. This was distinctly held in the Pooler v. Johnson case already cited. That case was cited with approval in the decision of which a review is asked, although its doctrine was disregarded in the concluding paragraph thereof. It is clear, therefore, that the decision complained of should at least be so modified as to exclude from the application of Staples all land not embraced in the quarter of the section containing his improvements."

The doctrine that the notice given by settlement and improvement extends only to the quarter section on which such settlement and improvement is made has been extended so far as to cover a case of settlement on a tract that has public land on one side only.

In the case of Brown v. Howlett, 17 L. D. 522, the Secretary says:

> "There is no issue as to that portion of the decision giving Lot 10 to Daniel W. Brown, and Avery, in his appeal, raises only the question as to that part of the decision that awards land to the entryman, and argues at length that the holding of this department that the notice given by settlement extends only to the quarter section upon which the settlement was made is erroneous. That rule is too well settled now to consider the argument, and it is too well supported by equity to need any defense. But it is further agreed that in the particular case at bar, as there was only government land on one

side, settlement on either lot nine or ten could only be construed to mean settlement upon sufficient land to constitute a quarter section, and as the amount over and above lots 9 and 10 to make a quarter section could only be had from the N. ½ of the S. E. ¼ that the notice given by settlement on either lot nine or ten must have been extended to that portion which, under the decision appealed from, was given to the entryman. *The rule of this department, above cited, is a general rule, applying in all cases,* and it is not affected by the circumstances here urged, and after an examination of the record and evidence, it appears that the decision appealed from was correct, and the same is hereby affirmed."

This rule is wise and equitable and not open to criticism. A settler upon public land may, if he so desires, in the absence of an adverse claim, enter four forty-acre tracts running either north, south, east or west from his improvements, or he may enter two forties running in either direction and two additional forties at right angles to the first. But for this rule, a settler making improvements on single subdivision of public land could effectually exclude all the land within a mile of his improvements from any disposition whatever. The rule is not a harsh one; it simply requires the settler to make his election and in some manner indicate the land which he intends to claim. In the absence of such election and some notice or improvements indicating the same, he cannot, after the survey of the lands, make his election and extend his claim into another quarter section, on which he has no improvements, as against a valid intervening claim whether based on settlement or otherwise.

The modification of the rule, first announced in the Hickey case, that the rule is restricted to adverse claims under the settlement laws and does not extend to a railroad selection is not supported by the authorities. The case of Ferguson v. McLaughlin (96 U. S. 174) arose in a conflict between a settlement claim and a railroad grant; and, in the department, the cases of Brown v. Central Pacific R. R. Co. (6 L. D. 151) and Union Pacific R. R. Co. v. Simmons (6 L. D., 172) were cases of settlement claims conflicting with railroad grants, and involved the identical question in issue here. The case of Peasley v. Whitney (18 L. D., 356) involved a conflict between a settlement claim and an entry under the stone and timber law.

This precise question arose and was decided by the Circuit Court of the United States for the Northern District of California in the case of United States v. Central Pacific R. Co., 84 Federal, 88, which was a suit by the United States to cancel a patent issued to the Railroad Company under Act of Congress of July 25, 1866, 14 Stat. 239, upon the ground that the right of preemption had attached to the land involved at the time the line of the Company's railroad was definitely fixed. The Act of 1866 granted to the railroad every alternate section of land designated by odd numbers to the amount of ten sections per mile on each side of its railroad line and provided that "When any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise

disposed of, other lands designated as aforesaid shall be selected by said Companies in lieu thereof." The map of definite location of the Company's railroad was filed in the office of the Secretary of the Interior on the 13th day of September, 1867. The E. ½ N. E. ¼, Sec. 33, Twp. 22 N., R. 4 E. Mt. Diablo Mer., is within the primary limits of the railroad company's grant and a patent was issued to the railroad company therefor on the 24th day of January, 1880. In 1858 one Michael Lannon settled upon the W. ½ N .W. ¼ of Sec. 34, said township and range. Said township was then unsurveyed. On February 11, 1867, Lannon qualified himself to enter lands under the pre-emption laws by filing his declaration of intention to become a citizen of the United States. In May, 1871, Lannon built a house and moved upon the E. ½ N. E. ¼ Section 33 in said township having some time prior thereto declared, fenced and had an orchard and vineyard upon the last named tract. It was contended by the United States that as Lannon was a qualified pre-emption claimant, his right of pre-emption had by his settlement and occupation of the land in Section 34 attached to the land in Section 33 at the time the line of the railroad was definitely fixed. Passing upon this contention the Court said:

> "It is contended that, as Lannon became a qualified pre-emptor February 11, 1867, and was at that time a settler upon public unsurveyed lands of the United States, his pre-emption claim had attached when the map of the location of the railroad was filed with the Sec-

retary of the Interior on the 13th day of September, 1867. He was a settler on the W. ½ of the N. W. ¼ of Section 34, but the question remains, was he at that time a settler on the E. ½ of the N. E. ¼ of Section 33—the land involved in this suit? The evidence in the record does not establish that fact. He did not build a house and move upon the last-named subdivision until May, 1871. It is true, he claims to have made some improvements on this subdivision of land prior to that time, but not earlier than 1869—two years after the right of the railroad company had attached. The only claim he appears to have to this particular subdivision, as against the claim of the railroad company, is the fact that he was entitled to pre-empt 160 acres of land, and the particular subdivision of section 34 upon which he settled in 1858, and resided upon down to 1871, contained only 80 acres; that the adjoining subdivision of section 33, containing 80 acres, made up the full tract of 160 acres, and both together constituted his pre-emption claim. This is, clearly, not sufficient. As the land was unsurveyed, Lannon could not initiate his claim by taking proper proceedings in the land office, but he could have indicated his purpose to claim the land by some act of settlement or residence upon or cultivation of this particular subdivision, and, to establish a better right than the claim of the railroad company on this ground, it should appear that he made this claim prior to September 13, 1867, when the right of the railroad company to that section became fixed by the location of the line of the road. Having a residence upon a subdivision of section 34, it was not necessary that he should move upon section 33 in order to make a subdivision of that section part of his pre-emption claim of 160 acres, but he was at least required to place some improvements upon it in the way of clearing, fencing, or by cultivation, to indicate that it was part of his claim, and, failing in this, I am of the opin-

> ion that there was no priority in the pre-emption claim to the land in dispute, that the grant to the railroad attached at the time the line of road was definitely fixed, and that the patent was properly issued."

In that case, as in this, the question at issue was whether, by a settlement upon unsurveyed land, the right of pre-emption or homestead has attached or been initiated to an adjoining tract of land, in another section or quarter section, which the settler has not occupied and upon which he has made no improvements, and the decision of the court was against the claim of the alleged settler.

Upon these authorities, it is submitted that, as Jerry Hickey had not in any manner resided upon, cultivated or improved the lands in controversy, or in any manner indicated his intention to claim the same, at the time of the filing of the railway company's selection of said lands, no adverse right or claim had attached or been initiated to said land and that said land was, as between Hickey and the railway company, subject to selection by the latter.

II.

HICKEY'S HOMESTEAD APPLICATION AND THE HOMESTEAD ENTRY MADE BY HIS HEIR DID NOT OPERATE TO DEFEAT AND CANCEL THE RAILWAY COMPANY'S SELECTION OF THE LAND IN CONTROVERSY AND OPEN SAID LAND TO THE STONE AND TIMBER ENTRY OF DEFENDANT IN ERROR.

This proposition rests upon the following grounds:

1. Hickey's settlement upon the land in controversy is wholly constructive and rests upon his set-

tlement upon adjoining land. His homestead application and the homestead entry made by his heir, were both subsequent to the railway selection, and were not, in view of their subsequent relinquishment and cancellation, a bar to the railway selection or to the approval thereof.

2. The entry of the land in controversy made by the heirs of Hickey was never completed and did not operate to cancel the railway selection which had been allowed by the district land officers before the presentation of Hickey's homestead application and was pending at the time of the relinquishment of the Hickey entry.

3. The abandonment and relinquishment of the homestead entry did not restore the land to the public domain and open it to entry under general laws or to the timber and stone land entry of defendant in error.

1.

HICKEY'S HOMESTEAD CLAIM WAS NOT PRESENTED TO THE DISTRICT LAND OFFICERS UNTIL AFTER THE ALLOWANCE OF THE RAILWAY SELECTION. IT WAS SUBSEQUENTLY RELINQUISHED AND CANCELED AND WAS NOT, THEREFORE, A BAR TO THE RAILWAY SELECTION.

In the court below plaintiff in error contended that an application to file or enter which was never completed and under which no right was being asserted did not operate to reserve the land applied for from appropriation and thereby invalidate a railway selection, in all respects regular, to the end

that subsequent applications might take precedence over the selection. In support of such contention the decisions of the Secretary of the Interior in Northern Pacific R. R. Co. v. Dean, 27 L. D. 462, and Northern Pacific R. R. Co. v. Fly, 27 L. D. 464, were cited.

The Supreme Court of the State assents to this proposition, but treats the case as one where the homestead entry was of record at the time of the railroad selection and holds that the selection will not operate automatically to segregate the land for the railway company's benefit for an indefinite period and until an adverse claim in existence at the time of such selection shall be matured or abandoned. In so doing the court loses sight of the particular facts in this case. This is not a case where an entry or claim was in existence and of record at the time of the selection. Hickey was not in fact a settler upon, nor had he in any manner occupied or improved the land in controversy at the time of the railway company's selection thereof. His claim is wholly constructive and rests upon his settlement upon adjoining land. His application and the homestead entry made by his heir were not filed until after the selection. The homestead entry and all the right, title and interest of the claimant thereunder were relinquished to the United States within four weeks after the allowance of the entry by the district land officers. Upon these facts, the presentation of the homestead application and the allowance of the homestead entry did not, in view

of the subsequent relinquishment and cancellation of the entry, operate to defeat the company's selection and the subsequent approval thereof. The case is clearly within the rule laid down by the Department in Northern Pacific R. R. Co. v. Dean, and Northern Pacific R. R. v. Fly, supra. In the Dean case (27 L. D. 462) the Secretary said:

> "It must be remembered that the company's selection of the lands here involved was approved by the local officers and allowed to go on record, and the only effect of the decision of March 11, 1895, was to hold said selection to be subject to the completion of the applications by Peter Dean and others, presented prior to said selection.
>
> It would be inequitable as well as illegal to hold that a mere application to file, never completed, and under which no right is now being asserted, served to reserve the land, and thereby invalidate a selection of the land, in all respects regular as far as shown by the record before me, to the end that applications presented at a date subsequent to the selection of the land might take precedence over the selections."

And in the Flye case (27 L. D. 464), the Secretary said:

> "This in nowise affects the holding that the status of the land at the date of proffering or tendering selection, should control the action of the local officers in rejecting the same or allowing it to go of record, but where, contrary to the practice adopted in the administration of these land grants, the local officers erroneously allow a railroad indemnity selection to go of record during the pendency of a prior adverse claim, it is within the authority of the Secretary to permit such selection to stand, and to give it his final approval upon the subsequent abandonment or other elimination of the adverse claim. This results from the fact that

> a railroad indemnity selection does not become finally effective until approved by the Secretary and if at that time the land is free and the company is entitled to the indemnity, the fact that there was an adverse claim to the land when the selection was proffered or tendered constitutes no legal obstacle to the Secretary's approval under the law."

The Act of August 5, 1892, extends the right of selection to unsurveyed as well as surveyed lands, "not reserved and to which no adverse claims shall have attached or been initiated at the time of the making of such selection."

In a recent decision, involving the construction of Section 3 of the Act of March 2, 1899, 30 Stat. 993, in which the Northern Pacific Railroad Company was granted the right to select lands "not reserved and to which no adverse right shall have attached or been initiated at the time of the making of such selection," the Secretary of the Interior held that so long as rights protected by the Act are not prejudiced, the existence of a settlement claim at the time of a railway selection will not on the abandonment of the settlement claim preclude the approval of the selection as though such prior claim had never existed. In that case the Secretary said:

> "The tract in question is not part of a grant in place the rights under which became fixed upon the happening of a certain event or the performance of certain duties on the part of the grantee. It is rather a mere exchange of land and the provision in the Act limiting the selection to lands to which no adverse right shall have attached or been initiated at the time of making the selection, is intended as a saving clause rather than as an exception of

lands from selection. As before stated, McCracken's claim in no wise rests upon the claim formerly asserted to this land by Shannon. He does not claim under or through such claim but merely urges the existence of Shannon's claim at the time of selection, afterwards abandoned, for the purposes of defeating the selection to the end that his settlement, made at a date long subsequent to the selection by the Company and the abandonment of Shannon's claim, may be recognized.

In the opinion of the Department he is clearly not entitled to the protection accorded adverse rights which had attached or been initiated prior to the making of the selection. This view is in accord with that expressed in the unreported departmental decisions rendered December 16, 1904, and March 17, 1905, in the case of John R. Donohue v. St. Paul, Minneapolis and Manitoba Ry. Co., involving construction of a similar provision found in the Act of August 5, 1892."

McCracken v. Northern Pac. Rd. Co.

Decided by Secretary Nov. 9, 1907, not yet reported.

This case is exactly in point and is especially important in that in cites, affirms and follows the decisions of the Department in the controversy between Donohue and the Railway Company. It is supported by the decision of this Court in Oregon, etc. R. R. Co. v. United States, 190 U. S. 186. In that case the land was embraced in an Oregon donation, notification. This notification was substantially the same as an original entry under the homestead law and by it the donation claimant acquired the same rights as are acquired by filing the original homestead entry. While this notification or filing was of record and uncanceled the land was

selected by and patented to the railway company. Conceiving that the notification operated to reserve the land and constituted a bar to the company's selection, the United States filed its bill in equity against the company to cancel the patent. The suit ended in the dismissal of the bill. The court (190 U. S. 196) said:

> "It is true that the donation notification had not been formally cancelled, but the donation acts made no provision for such cancellation, although it may, perhaps, have been within the power of the land department to take such action even prior to the act of 1894. This, however, was not done, and the land might have remained in that condition permanently had not some other person applied to enter or purchase it by showing that it had been abandoned by the original donee. But, if this may be done by an individual pre-emptor, why may not a railroad company do the same thing by claiming the land under its grant, and showing in defense to this suit that it had actually been abandoned? It may be said that presumptively the land had been reserved, as shown by the donation notification, and for aught that appeared the donee might still be in possession, but we know of no reason why the railroad company may not show the actual facts as well as an individual who might desire to enter the land upon his own account."

Bearing in mind the fact that Hickey's settlement upon the land in controversy was wholly constructive, that his application was not presented until after the railway selection had been filed with and allowed by the district land officers, that the claim and entry were abandoned and relinquished, it is submitted that the allowance of the entry by the district land officers did not operate to defeat

the railway selection and open the land to entry by defendant in error upon the relinquishment of the claim.

The conclusion that the Hickey claim operated to defeat the railway selection must rest upon the proposition that upon the presentation of Hickey's homestead application his right attached by relation as of the date of his alleged settlement and that the land was by relation retrospectively segregated from the public domain, so as to bar the intervening selection of the railway company. That the doctrine of relation can not be invoked so as to cause Hickey's application to operate retrospectively to segregate the land from the public domain and defeat an intervening selection was strenuously urged in the court below. The Supreme Court of Minnesota appears, however, to have lost sight of the contention; at least it does not in any manner refer to or pass upon this question, except in so far as a decision thereon is necessarily involved in its judgment.

Under the homestead law of 1862 the claimant's right could not attach by settlement upon the land but only by an entry in the land office. Maddox v. Burnham, 156 U. S. 544. By Section 3 of the Act of May 14, 1880, it is provided that any settler who has settled, or who shall settle on any of the public lands, with the intention of claiming the same under the homestead law, shall be allowed the same time to file his homestead application and perfect his entry in the land office as it allowed to settlers under the pre-emption law to put their

claims on record, and his rights shall relate back to date of settlement the same as if he settled under the pre-emption law.

If Hickey was in legal effect a settler upon the land in dispute, in a controversy between him or one claiming under him, and the railway company, his right would under the Act of 1880, be held to relate back to the date of his settlement and defeat the intervening railway selection. But this is not a controversy between the railway company and Hickey, or any one claiming under him.

The purpose of the act of 1880 was to protect settlers on the public lands who followed up and perfected their claims, and not subsequent claimants who do not stand in privity with the original claimant. The statute can have no application to this case for the reason that the Hickey claim was never completed, but on the contrary was abandoned and relinquished so that there is no right now existing upon which the doctrine of relation can take hold

The settlement claim must be followed up to title or there can be no relation back to the time of settlement. In Shepley v. Cowan, 91 U. S. 330-338, the court, considering the rights acquired by a settlement and entry under the pre-emption laws, says:

> "The party who takes the initiatory step in such case, *if followed up to patent*, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act and cuts off all intervening claims."

In Sturr v. Beck, 133 U. S. 541, the court quotes with approval the language used in Shepley v. Cowan, supra, and referring to the act of May 14, 1880, and rulings of the Land Department thereunder, says:

> "The ruling of the Land Department has been *that if the homestead settler shall fully comply with the law as to continuous residence and cultivation*, the settlement defeats all claims intervening between its date and the date of filing his homestead entry and in making final proof his five years' residence and cultivation will commence from the date of his actual settlement."

There is nothing in the record to show that Hickey or his heirs ever fully complied with the law as to continuous residence and cultivation; in fact they did not do so. On the contrary, the stipulation of facts conclusively shows that the final proofs of settlement and cultivation were never made, but after original homestead entry had been made, the entry and all rights thereunder were relinquished to the United States. The act of 1880, therefore, has no application to this case.

Donohue, the defendant in error, is not in position to invoke the doctrine of relation. He does not stand in any privity with Hickey or his heirs—he is a stranger to their claim. In Lynch v. Bernal, 9 Wallace, 315-325, the court held that the doctrine of relation "is applied only to subserve the ends of justice and to protect parties deriving their interest from the claimant pending the proceedings for the confirmation of his title." In Gibson v. Choteau, 13 Wallace, 92-101, the court held "that the

doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice and is only applied for the security and protection of persons who stand in some privity with the party who initiated proceedings for the land and acquired the equitable claim or right to the title."

These authorities establish that the doctrine of relation is only applied: 1. For the security and protection of persons who stand in some privity with the original claimant, and, 2, For the purpose of justice.

1. *Donohue, the defendant in error, does not stand in privity with Hickey or his heirs.*

This is not open to question. His rights rest solely upon his entry under the stone and timber land law of 1878, allowed by the district land officers at Cass Lake July 2, 1903, after the relinquishment and cancellation of the Hickey entry. He is not and never was a settler upon the land in controversy and the law under which he entered is not a settlement law.

2. *Justice does not require the application of the doctrine of relation for the security and protection of the defendant in error.*

Donohue was the attorney for Bridget Hickey in the proceedings before the Land Department and as such attorney had knowledge of all the facts and circumstances involved in the Hickey claim.

Section 2291 Revised Statutes provides that no certificate of entry shall be given or patent issued until the expiration of five years from the date of

the original entry, or under the Act of May 14, 1880, five years from the date of settlement, and then, only on proof of five years' continuous residence or cultivation. In his homestead application Jerry Hickey claimed to have settled March 22, 1893. He died in the month of March, 1897, four years after his alleged settlement and one year before the expiration of the five years' residence period.

The Secretary's decision permitting Hickey's heirs to make the original homestead entry bears date February 11, 1903. The entry was made on June 4, 1903, and on July 2, 1903, four weeks later, the relinquishment thereof was filed in the District Land Office, and on the same day the District Land officers allowed Donohue's preliminary filing under the Timber and Stone Law of 1878.

It is stipulated that Hickey's mother and sole heir resided in the State of Maine, and that she never made the proofs required by Section 2291 Revised Statutes. It nowhere appears in the record that she was ever in the State of Minnesota or that she ever resided upon or cultivated the land claimed for the uncompleted portion of the residence-cultivation period, although cultivation, at least, was required. For all that appears her claim, if any, had been in fact abandoned long before the Secretary's decision permitting her to make the original entry.

These facts strongly suggest, if they do not actually establish, that this dead and abandoned claim was presented to the Department for the sole purpose of defeating the Railway Company's selec-

tion, which was otherwise valid, to the end that Donohue, the claimant's attorney, might acquire the right to enter and obtain the title.

That the Secretary of the Interior was of this opinion is obvious from his decision of March 17, 1905, denying Donohue's motion for review of the decision of December 16, 1904. In his said decision of March 17, 1905, the Secretary said:

> "*In the original decision in this case upon the Hickey contest, the department was moved to its conclusion because of those considerations that are often extended by this department and the courts in favor of the pioneer settler upon the public lands.* The case invoked by the department in reaching its conclusion was that of Tarpey v. Madsen (178 U. S. 215, 220), wherein it was said by that court: 'And in this respect we must notice the oft-repeated declarations of this court, that the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. Ard v. Brandon, 156 U. S. 537, 543; Northern Pacific Railroad v. Amacker, 175 U. S. 564, 567. With this declaration, in all its fullness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claim every intendment should be in his favor in order to perfect the title which he was seeking to acquire.'
>
> *Had the real condition been then presented to the department, namely, that the land was not desired by the original settler and those dependent on and claiming through him, but rather that such claim was being used merely for the purpose of avoiding a selection in all other respects regular and valid, to the end that a third party might at this late date initiate a claim to the land, a different conclusion would have been reached; in fact, the authority invoked would have supported such a conclusion.*"

The Act of May 14, 1880, was intended to protect the actual settler by permitting him to assert his claim as of the date of his settlement. It does not, however, permit the supposed rights of a former settler, which have been abandoned and relinquished, to take effect as of the date of the alleged settlement for the sole purpose of defeating an existing selection or entry, which is in all other respects valid, to the end that a third person, who has full knowledge of the facts, may be permitted to enter and acquire the title. Such a construction is not in accord with justice and the equitable doctrine of relation.

2.

THE ENTRY OF THE LAND IN CONTROVERSY BY HICKEY'S HEIRS WAS NEVER COMPLETED AND DID NOT OPERATE TO CANCEL THE RAILWAY COMPANY'S SELECTION.

In his decision of February 11, 1903, in the contest between the Railway Company and Bridget Hickey, heir of Jerry Hickey, the Secretary of the Interior held that "upon the completion of entry by the heirs of Hickey, the selection by the company as to the land here in question will be canceled." (Record, page 22, original 45.)

The Supreme Court of Minnesota held that the admitted facts show and that the department found a completion of the homestead entry. The admitted facts bearing upon this question are that on June 4, 1903, Bridget Hickey filed in the district land office her homestead entry in lieu of the application

theretofore filed by Jerry Hickey, which had been lost, made the homestead affidavit required by Section 2290, Rev. Stat. U. S., paid the land office fees and commissions, and was allowed to make and did make the homestead entry required by Section 2290 Rev. Stat. That she never made the final proofs required by Section 229 Rev. Stat., and the district land officers never issued the final homestead entry certificate provided for in that section. (Record, pages 22 and 23, original 45 and 46.)

These facts do not show and the department did not find a completion of the entry. In his decision of December 16, 1904, affirming the Commissioner's decision holding Donohue's entry for cancellation, the Secretary said:

> "The cancellation of the company's selection was rightfully withheld awaiting the action of the heir under said ruling. *Instead of making completion of the entry*, it appears that she filed a new application as heir and made the original entry of the land. This was not contemplated in departmental decision or necessary and it must be held that upon the relinquishment of said entry by Bridget Hickey, *the right of the company under its selection, which was still pending*, attached and the entry of Donohue should not have been allowed."
>
> (Record, page 28, original 57).

In this decision the Secretary specifically finds that the Hickey entry was not completed within the meaning of his former decision. The Supreme Court of Minnesota, however, says that this holding was reversed by the Secretary on March 17, 1905. The Secretary's decision of March 17, 1905 was

made in passing upon Donohue's motion for the review of the former decision of December 16, 1904. In said decision the Secretary, in his recital of the facts, says that "as soon as a favorable decision was secured upon the Hickey contest, the original homestead entry was completed of the land." The Secretary by this language means to say no more than that the original homestead entry had been made. It will be noted that he does not say that entry of the land was completed, but that *original* homestead entry was completed. That the Secretary did not reverse, but on the contrary, specifically declined to reverse his former decision is obvious from an examination of the decision of March 17, 1905. In that decision the Secretary said:

> "The department cannot, therefore, under the circumstances hereinbefore detailed, accord to Donohue a superior claim under his application. It is unnecessary to specifically consider the technical questions sought to be raised in the motion now under consideration. Suffice it to say, that the cases referred to have no application to the facts presented herein and upon a most careful consideration of the entire matter the department adheres to its decision of December 16 last, and the motion for review is therefore accordingly denied and herewith returned to the files of your office relating to said case." (Record, page 30, original 60.)

That the officers of the department did not consider the homestead entry as completed within the meaning of the former decision is obvious from the fact that upon receipt of the Hickey relinquishment, the Commissioner at once canceled the homestead

entry and instructed the district land officers to call upon the railway company to adjust its selection to the lines of the government survey; that when advised of the allowance of Donohue's timber and stone land entry, the Commissioner suspended that entry for conflict with the railway selection and within a short time thereafter held said entry for cancellation, and that the decisions of the Commissioner were affirmed by the Secretary of the Interior who, upon the filing of a motion for review, declined to disturb his former decision.

Notwithstanding this consistent line of procedure and decision, the Supreme Court of Minnesota seizes hold of a single word, inaptly used in the Secretary's decision on the motion for review, and on that word finds a reversal of the former decisions.

THE ADMITTED FACTS DO NOT SHOW A COMPLETION OF THE HICKEY ENTRY WITHIN THE MEANING OF THE HOMESTEAD LAW.

That a homestead entry under Section 2290 gives to the entryman an inchoate right to the land, and during its existence bars the acquisition of adverse rights or claims is not disputed, but such an entry is not a completed entry. It creates no vested rights against the United States and does not interfere with the power of Congress, by subsequent legislation, to dispose of the land.

In Whitney v. Taylor (158 U. S. 85), the court, discussing the difference between a pre-emption declaratory statement and an original homestead en-

try under Section 2290 Revised Statutes, said:

> "Indeed, this declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title. The purpose of each is to place on record an assertion of an intent to obtain title under the respective statutes. 'This statement was filed with the register and receiver and was obviously intended to enable them to reserve the tract from sale, for the time allowed the settler to perfect his entry and pay for the land.' Johnson v. Towsley, 13 Wall. 72-89. By neither the declaratory statement in a pre-emption case nor the original entry in a homestead case is any vested right acquired as against the government. For each fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention."

And Mr. Justice Brewer, in the Circuit Court of Appeals, speaking of an entry under Section 2290, says:

> "Such an entry creates no vested rights as against the United States and does not interfere with the power of Congress, by subsequent legislation, to dispose of the land."
>
> Norton v. Evans, 82 Fed. 804.
>
> Wagstaff v. Collins, 97 Fed. 5.

In Dealey v. United States, 152 U. S. 539-545, which was an indictment for conspiracy to defraud the United States of large tracts of land "by false, feigned, illegal and fictitious entries under the homestead laws of the United States," it was urged on motion for a new trial and in arrest of judgment, that the word "entry" in homestead cases has a "settled technical meaning and has reference

only to the initiation of the proceedings." Passing upon this contention the court said:

> "The argument is that the word "entry," having a technical meaning, must be taken with that meaning in this indictment; that, as thus understood, an entry in a homestead case being but a preliminary act, does not operate to divest the title of the Government, and, as is said in the brief: 'The charge that defendants conspired to defraud the government by means of false entries to lands under the homestead laws will thus be seen to be a charge of an innocent act.'
>
> But the popular understanding of the word is not thus limited. It is common to speak of an entry of land under the homestead law, meaning thereby not a mere preliminary application, but the proceedings as a whole, the complete transfer of title. Counsel concede that in cash purchase and pre-emption cases it is even technically used to describe the final proof or final purchase, but seek to draw a distinction between its use in those cases and under the homestead law. Even if it were conceded that such a distinction is recognized in the statutes and authorities, it would not change the significance of the popular use."

These authorities establish that the original entry under Section 2290 is not a completed homestead entry and that the Supreme Court of Minnesota erred when it decided to the contrary.

THE ALLOWANCE OF THE HICKEY HOMESTEAD ENTRY BY THE DISTRICT LAND OFFICERS DID NOT OPERATE TO CANCEL THE RAILWAY COMPANY'S SELECTION WHICH WAS STILL PENDING.

The Supreme Court of Minnesota held that the Hickey entry, when allowed by the district land officers, operated as a matter of law to cancel the railway selection. The court does not discuss this

proposition, but rests its decision wholly upon the decision of the Secretary of the Interior in Northern Pacific R. R. Co. v. Reed, 27 L. D. 651. In the Reed case the land in controversy was within the indemnity limits of the railroad grant and had been withdrawn from settlement and entry by order of the Secretary of the Interior. In 1878, after the withdrawal, the district land officers permitted one John Abrahamson to make homestead entry of the land involved. When the entryman learned that his entry covered land withdrawn for the railroad company he petitioned the department to be allowed to make a new entry, whereupon the Commissioner held that Abrahamson would be allowed to elect whether he would have his entry canceled in accordance with his request or allow it to remain intact awaiting the adjustment of the railroad grant. The entryman thereupon abandoned his claim and made another homestead entry in lieu of the homestead entry of the land involved. The fact of abandonment appears not to have been brought to the attention of the Commissioner and the original entry was permitted to remain of record. In 1883 the railroad company filed its selection list for said land and in 1895 Abrahamson's entry was canceled for conflict with the selection. In April, 1895, Reed made application to enter said land, claiming among other things, that the existence of the Abrahamson entry at the time the railroad selection was filed was a bar to such selection and that the selection was therefore null and void. Passing upon this contention the Commissioner held that where an

entry is allowed to stand, subject to the right of a railroad company to make indemnity selection of the land, the subsequent allowance of the selection works in effect the cancellation of the entry then of record, and that the validity of the selection is not affected by the fact that the entry is not formally canceled at such time. This is no more than holding that, as the entry was allowed to stand awaiting the selection, the entry was not a bar to the selection which rendered the latter illegal and void. The gist of the decision is that the validity of the selection is not affected by the fact that the entry had not been formally canceled at the time of selection. This falls far sort of a decision to the effect that the allowance of the selection so far works a cancellation of the original entry as to open the land to entry by a third person against the original entryman if he is then asserting a right under his entry.

The railway selection having been permitted to stand awaiting the completion of entry by Hickey's heirs, the existence of the selection was not a bar to the allowance of the original homestead entry, but that entry did not operate ipso facto to cancel the railway selection. The selection was of record and until formally rejected and canceled by the Land Department constituted an existing claim to the land.

3.

THE ABANDONMENT AND RELINQUISHMENT OF THE HICKEY HOMESTEAD ENTRY DID NOT RESTORE THE LAND IN CONTROVERSY TO THE PUBLIC DOMAIN AND OPEN IT TO ENTRY BY DEFENDANT IN ERROR UNDER THE TIMBER AND STONE LAND LAW.

The Supreme Court of Minnesota held that upon the relinquishment and cancellation of the Hickey entry the land in controversy was restored to the public domain and open to entry as other public lands.

Assuming, though not conceding, that Hickey's settlement on land in the S. E. ¼ of Section 3 was in legal effect a settlement upon the land in controversy, the selection, though perhaps voidable, was not void. If Hickey was in legal effect a settler upon the land in controversy the selection was voidable at his instance, but it could be annulled and canceled only by the presentation of his claim to the officers of the Land Department and following the matter up to the cancellation of the selection. This was not done.

An application to enter was filed and the entry provided for in Section 2290 Revised Statutes was made. But within four weeks after the allowance of this entry the claim was abandoned and the entry, together with all claim and right thereunder, or in the land embraced therein, relinquished to the United States without any offer or attempt whatever to comply with the provisions of Section 2291 Revised Statutes. No final decision annulling or cancelling the Railway Company's selection

had been entered or made. The relinquishment of the Hickey claim and entry, therefore, left the selection in precisely the position it occupied when the homestead application was filed, that is, a subsisting selection which had been presented to the district land officers and allowed by those officers.

That the Railway Company's claim and selection had not been finally disposed of at the time of the Hickey relinquishment is beyond question. The Secretary held that Hickey's settlement on Lot 15 was in law a settlement upon the entire tract embraced in his homestead application, that by such settlement he had initiated a claim to all of the land included in his homestead application. He accordingly reversed the Commissioner's decision and held that "upon completion of entry for this land by the heirs of Hickey, the selection by the Company as to the land here in question will be cancelled."

That the Secretary's decision was interlocutory; was not intended to be and was not a final judgment of cancellation against the Railway Company's selection is obvious from the subsequent decisions of the Commissioner and Secretary. In his letter of February 18th, 1904, to the Cass Lake Land Office, the Acting Commissioner, after accepting Hickey's relinquishment says:

> "This releases *from suspension* the selection by the St. Paul, Minneapolis and Manitoba Railway Company."
>
> Record, page 24, Original 49.

In his decision of March 25, 1904, holding Dono-

hue's Timber Land Entry for cancellation, the Commissioner says:

> "This entry should not have been allowed; the contest for this land was between the railway company and the heirs of Jerry Hickey, *but before the final action on the case and the rejection of the Company's application to select*, the claim of the heirs of Hickey was relinquished and their homestead cancelled, which left the land subject to the selection of the company."
>
> Record, page 25, Original 50-51.

In his decision of December 16, 1904, the Secretary, referring to plaintiff's entry, says:

> "The cancellation of the Company's selection was rightfully withheld awaiting the action of the heir under said ruling. *Instead of making completion of the entry*, it appears that she filed a new application as heir and made the original entry of the land. This was not contemplated in departmental decision or necessary and it must be held that upon the relinquishment of said entry by Bridget Hickey, *the right of the Company under its selection, which was still pending*, attached and the entry of Donohue should not have been allowed."
>
> Record, page 28, Original 56-57.

It thus clearly appears that the Secretary's decision allowing Hickey's heirs to make completion of entry was not a final judgment annulling the railway selection but, on the contrary, simply suspended the selection until the entry was completed by complying with the requirements of Section 2291, Revised Statutes, and that the selection was pending when the homestead entry was relinquished and canceled.

And this construction is amply supported. In New Orleans v. Payne, 147 U. S. 261-266, the court held that the rulings and acts of the officers of the Land Department of the United States, until the matter is closed by final action, are as much open to review by himself and his successors as are the interloctutary decrees of a court open to review upon the final hearing. In a case in the United States Circuit Court of Appeals for the Eighth Circuit the court, (Mr. Justice VanDeventer), referring to a similar question said:

> "During the pendency of these proceedings, while the legal title was yet in the United States, and with notice of plaintiff's claim, the defendants purchased the land from Judd, cut and removed therefrom the timber, and sold the lumber into which it was sawed by them. In doing this, the defendants relied upon a ruling of the land offices which declared Judd's claim to be the superior one, and under which he had submitted proof of compliance with the homestead law, and had obtained a certificate declaring that he was entitled to a patent. But this ruling and the issuance of this certificate were not in themselves final acts, and, no patent being issued thereon, they never became final. The rulings and acts of the officers of the Land Department of the United States, made and done in the course of proceedings to obtain the title to public land before the issuance of a patent, are interlocutory; and, until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing.
>
> Peyton v. Desmond, 129 Fed. 1-8.

The railway selection was pending and undetermined at the time of the relinquishment and cancellation of the Hickey entry. The land was not, therefore, open to entry by the defendant in error.

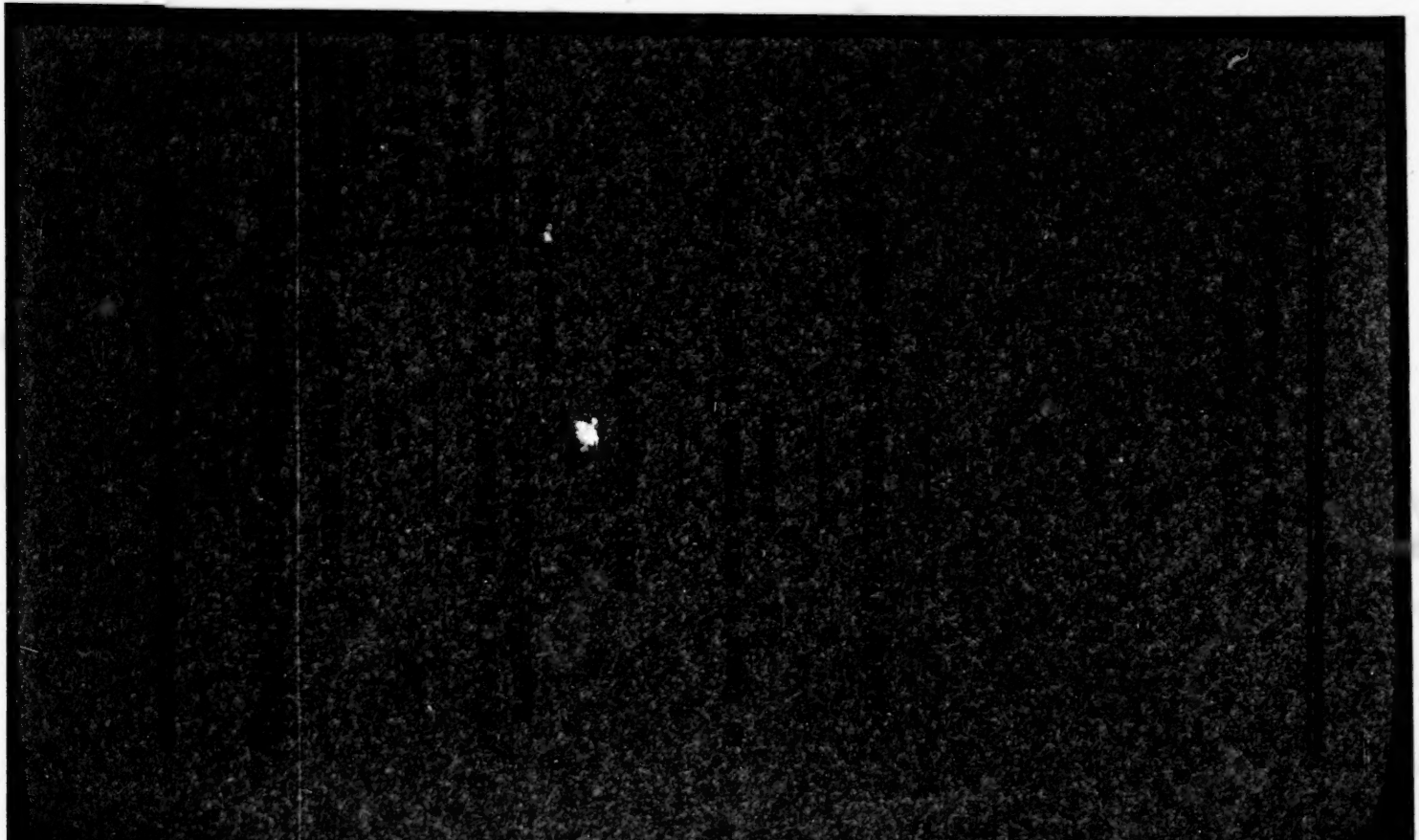
Section 3 of the Act of August 5, 1892, grants the right to select unsurveyed lands. It is not claimed that by a selection of unsurveyed lands the Company acquires a complete equitable title. The transaction growing out of the Act of 1892 was in the nature of an exchange of lands, the Company relinquishing to the United States certain lands owned by it and receiving in lieu thereof the right to select an equal quantity of other lands. Until the surveys were made the selection must of necessity be made in such manner as will identify the lands with reasonable certainty. The Act while permitting this, requires the Company within three months after the survey to file a supplemental list conforming or adjusting its selection to the public surveys. Until the survey was made and the selection adjusted, the description of the land by its government subdivision cannot be known and the selection cannot be approved and carried into patent. While the selection does not pass the equitable title to the land, it unquestionably operates to withdraw the land from other appropriation pending the survey of the land and the final consideration and approval or rejection of the selection by the Secretary of the Interior. If this is not the case, then the right to select unsurveyed lands,

granted by the Act is a nullity and of no benefit to the Railway Company whatever.

The railway selection was pending and undetermined in the land department at the time the entry of defendant in error was allowed by the district land officers and operated to withdraw the land from such entry.

It is submitted, therefore, that the decision of the Supreme Court of Minnesota should be reversed.

THOS. R. BENTON,
Attorney for Plaintiff in Error.



(20,843.)

United States Supreme Court.

OCTOBER TERM, 1907.

No. 440.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,

Plaintiff in Error,

vs.

JOHN R. DONOHUE.

IN ERROR TO THE SUPREME COURT OF STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

ARGUMENT.

The Supreme Court of the State of Minnesota correctly held:

1. That Jerry Hickey had, prior to the railway company's selection of the land in controversy, initiated a claim to said land under the homestead law.

2. That the homestead entry of the land in controversy was completed by the heirs of Hickey, and that this entry operated to cancel the railway company's selection.

3. That upon the relinquishment of said homestead entry the land included therein was restored to the public domain and became subject to entry by the first legal applicant and to entry by Donohue under the timber and stone law.

I.

THE RIGHT OF JERRY HICKEY UNDER THE HOMESTEAD LAWS OF THE UNITED STATES HAD ATTACHED AND WAS INITIATED TO THE LAND IN CONTROVERSY PRIOR TO AND AT THE TIME OF THE ATTEMPTED SELECTION OF SAID LAND BY THE RAILWAY COMPANY UNDER THE ACT OF CONGRESS APPROVED AUGUST 5TH, 1892.

This proposition rests upon three grounds:

First. On findings of fact made by the Land Department.

Second. On questions of fact decided by the state court.

Third. As between the railway company and Jerry Hickey the railway company was barred from selecting the land in controversy and it never had any right thereto.

FIRST.

"A."

The Land Department held: "The entire matter considered, it is the opinion of this department that the record made in this case shows that Hickey had, prior to the selection of the land by the railway company, initiated a claim under the homestead laws to the entire tract embraced in his homestead application; that such right was duly and timely asserted, and was a *bar* to the selection of said land by the Manitoba company under the Act of August 5th, 1892." (Record, p. 22, fol. 45.)

It may be well to note that when the honorable secretary made the above finding of fact he had before him all the evidence in said case as the same was certified to him by the register and receiver of the local land office, and in arriving at his decision he reviewed the evidence as well as the law of the case.

The above and foregoing is a finding of fact by the Land Department, and as such is conclusive and controlling upon the court.

Nor. Pacific Ry. v. McCormick, 89 Fed. 659;
Lee v. Johnson, 116 U. S. 48;
Smelting Co. v. Kemp, 104 U. S. 636;
Baldwin v. Stark, 107 U. S. 463;
Carr v. Fife, 156 U. S. 494;
Johnson v. Towsley, 13 Wallace, 72;
Gonzales v. French, 164 U. S. 338;
Shepley v. Cowan, 91 U. S. 330;

Bear v. Luse, 6 Sawyer, 148;
Gardner v. Bonstell, 180 U. S. 362;
Ross v. Doe, 1 Pet. 656.

"B."

The question of Hickey's settlement and occupation was at issue in the Land Department, and was by it found in favor of Hickey; giving to this the most favorable construction possible for the railway company, it was at best *a mixed finding of fact and law*, and as such was conclusive and controlling upon the court.

Gertgens v. O'Connor, 191 U. S. 237;
Vance v. Burbank, 101 U. S. 514;
Moore v. Robbins, 96 U. S. 530;
Carr v. Fife, 156 U. S. 494;
Stewart v. McHarry, 159 U. S. 643;
Aurora Hill Con. Co. v. Min. Co., 34 Fed. 515; 515;
Jefferson v. Hun, 11 Pac. 351;
Calhoun v. Violet, 47 Pac. 179.

SECOND.

The state court held as an independent fact: "That Jerry Hickey, prior to the attempted selection of the land in controversy by the railway company, had initiated a claim under the homestead laws of the United States to the entire tract embraced in his application." (Record, pages 32 and 35, folios 66 and 71.)

In the case of Hill v. McCord, 195 U. S. 395 Honorable Justice Brewer writing the opinion, it

was held: "There are two well settled rules or decisions invoked, respectively, by the parties—one, *that the finding of fact made by the Land Department in the progress of a contest before it is conclusive upon the courts.* The other, *that questions of fact decided by a state court are not subject to review by this court in proceedings on error.*"

Gardner v. Bonestell, 180 U. S. 362.

THIRD.

"A."

In a conflict between a settler on unsurveyed land and a railway company the burden of proof is on the railway company to show that the settler is not entitled to the land, and that it is.

The rights of the railway company in this action rest entirely under its list of selections filed when the land was unsurveyed and its supplemental list adjusting its previous selections to the line of the public survey, both of which were made under the act of August 5th, 1892, by the terms of which the Manitoba company, in lieu of its relinquishment of other lands to which it had been held by the courts to be entitled, but which the United States had disposed of as public lands in disregard of the railroad's claim, and was granted a right to select "an equal quantity of non-mineral public lands of the United States not reserved, *and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection.*" (Record, page 20, fol. 41.)

The Honorable Secretary of the Interior, in his decision of Feb. 11th, 1903, fully expressed the only point in this case upon which the claim of the railway company hangs, when he said:

> "As the company was restricted in its selections to lands to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selections, the only question in this case is, had Hickey initiated a claim to the land in question within the meaning of the Act of 1892, piror to the selection thereof by the railway company." (Record, page 21, fol. 42.)
>
> "If Hickey had, prior to the selection of the land by the railway company, initiated a right or claim to this land under the homestead laws, it was an absolute bar to the selection thereof by the railway company, and it should never have been allowed to complete its selection." (Record, page 22, fol. 45.)

The action of the United States land office officials in allowing and permitting the railway company to subsequently perfect its selection was an error, and they were certainly acting under a misconstruction and misinterpretation of the law in so doing.

Under the Act of August 5th, 1892, if a right or claim had been initiated by anyone under the homestead laws for this land, the railway company would not and could not secure any right whatsoever therein, for the reason that their selections were limited and restricted to such lands only "against which no right or claim had attached or been initiated at the time of such selection." This

proposition is so clear that it should need no argument.

Now, then, did Hickey initiate a claim to all of this land prior to the attempted selection by the railway company?

The Act of Congress of May 14th, 1880, which is entitled "An act for the relief of settlers on public lands," in Section 3, reads as follows:

> "Any settler who has settled or who shall settle hereafter on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under pre-emption laws to put their claims on record, *and his right shall relate back to the date of settlement* the same as if he settled under the pre-emption laws."

It is conceded in this case, and it was conceded and decided in the proceedings before the Land Department in the case of Hickey v. The Railway Company, that Hickey settled on the land long prior to the selection thereof by the railway company, and the only objection made before the Land Department against allowing the claim in its entirety was that the land in controversy in this action was outside of the technical quarter section upon which he had his improvements. In the contest before the Land Department in the Hickey case and before the state court in this action it was argued by the railway company that Hickey's claim was limited to the quarter section upon which he

had his improvements, and that the railway company was on exactly the same footing as a settler or another purchaser, and in support of that contention the counsel argued that Hickey was bound to give notice to the railway company of the extent of his claim the same as he would to another settler or purchaser, *and that the burden of proof was on the settler to show that he gave such notice.*

Such is not the law either as enunciated by this court or by the Land Department. *It has repeatedly been held that a railway company does not occupy the position of a purchaser or a settler.*

The counsel for the railway company absolutely refuses to see the distinction between a settler's rights acquired by settlement, and a railway company's rights acquired by grant. He treats the railway company as if it were a settler and got its title to the lands by settlement, improvement and occupancy, as if the railway company, empowered under the Act of August 5th, 1892, to select unsurveyed land in this part of the country in lieu of certain lands released to the United States, stood upon the same footing in regard to unsurveyed land as homestead settlers under the Act of May 14th, 1880. *Nothing, we submit, is further from the fact and law. Settlers and railway companies do not stand upon the same footing. There is a clearly defined distinction between the rights of homestead settlers upon unsurveyed lands and the rights of the railway companies under a grant.* Although both settlers and railway companies get

their title from the United States, they get them by a very different process. The privilege of beginning or starting a homestead claim by settlement, which "inchoate right to the land" (as it has been called by the courts), becomes attached or fixed to the land by seasonably making a homestead application after the land is open for entry. This filing of the homestead application puts the claim on record and the settler's rights under it *"relate back to the date of settlement."*

To initiate this inchoate right, the settler goes upon the land and occupies and improves it as such, as is required by law.

After the land is open for entry, the settler must, within the time limit, file his application to enter same, and when said application is placed of record, all his rights to the land under this application relate back to the date of his settlement and his claim is in condition to ripen into a complete title. (Sturr v. Beck, 133 U. S. 541.) That is, it was the intention of congress by the Act of May 14th, 1880, to recognize and protect the rights of qualified settlers upon the unsurveyed lands, and to insure them the benefits of a full claim. It not only allowed them a certain time to put their claims on record, but also declared that such record should have the effect as if made at the time of settlement. (Sec. 3, Act of May 14th, 1880.)

As might reasonably be expected, contests arose between these homestead settlers upon unsurveyed land. Two equally qualified persons going upon the land at about the same time and performing the acts

required by law to be performed to initiate a claim to the land, the question was, which of these settlement claimants was entitled to the land? If both were equally meritorious, how was an equitable division of the land to be effected?

Some rule had to be formulated whereby the equities between two equally meritorious settlement claimants could be adjusted. This rule seems not an unfair one and has been adhered to by the department. It puts upon each settler the duty not only to protect his claim against the encroachments of other settlers, but also of not allowing others to be misled as to his land and to innocently make improvements upon it. Otherwise an innocent settler might settle upon and make improvements within the limits of another's claim and lose thereby not only his improvements, which would accrue to the first settler, but also his time, and perhaps an opportunity to select an equally good claim. In other words, this rule depends upon the obvious fact that where the title can be acquired only by the doing of specified acts, which acts are open to all settlers; in case of conflict, the person claiming the land must prove performance of the specified acts to the exclusion of the other settlers. If he cannot prove such performance, the land must be divided. This rule was conceived by the acting secretary as the most equitable one of effecting a division between the settlement claimant who had not performed the specified acts to the exclusion of the other.

It has never been the law, nor has it ever been

the ruling of the land department or the courts, that in order for a homestead settler upon unsurveyed land to sustain his claim to land that is in different quarter sections, he must first prove that he made the improvements, posted notices, etc., on all the land he claimed. If there is no other *settler* contesting or claiming the same land, it is not necessary for the homestead claimant to introduce proof that he made improvements on every part of the land claimed by him. *A settlement upon a portion of the land only will ustain a pre-emption or homestead claim to the whole 160 acres.*" (Quinby v. Conlan, 104 U. S. 420.)

It is only where there is another settler who is claiming the same land that the homestead claimant is bound to prove that he gave notice, either actual or constructive, that he claimed the land outside of the technical quarter section whereon he had his improvements. In other words, in a contest between settlers upon unsurveyed land, the burden of proof is upon the settler who is seeking to go outside of the technical quarter section upon which he has his improvements to show that he gave notice of the extent of his claim, either by posting notices or by giving personal notice.

While we are on this subject, it is well to note what Justice Lamar says, in the case of Elliott v. Neal, 4 L. D. 73-75:

> "Any act of settlement is sufficient to put a subsequent settler upon his notice and to compel him to inquire as to the real boundaries of the first settler's claim before risking a settlement that may possibly conflict therewith."

It was conclusively proven and was decided by the land department that Hickey had complied with all the provisions prescribed by the laws of the United States for acquiring a right to this land. He was a qualified settler; he claimed no more than the law allowed; he settled and made the necessary improvements upon the tract of land long before the railway company applied to select it. (Record, page 15, folio 31; also page 21, folio 42.) He excluded all other settlers from it; his claim was well recognized by those residing in the neighborhood of the land in question as early as 1893 (Record, page 22, folio 43); he seasonably filed his homestead application (Record, page 21, fol. 42); and for aught that appears, Hickey may have made improvements and posted notices on each and every 40 acres of his claim. (Record, page 16, folio 32.)

"B."

The burden of proof was not upon Hickey's heirs to show that he did those things, but the burden was upon the railway company to show that he did not, as the railway company was not in the same position as another settler.

Under the act of August 5th, 1892, the railway company was given the right to select such lands only which were not reserved and against which no adverse right or claim had attached or was initiated at the time of the making of such selection. (Record, page 21, folio 42.) In other words, the railway company had the right, and none other to make indemnity selections from the residum of

the land in this section of the country after the settler's rights had been satisfied.

The honorable secretary, in his decision of Feb. 11th, 1903 (Record, page 21, folio 43), expressly decides that *"The railway company is not in the same position as another settler and that it is not entitled to the same consideration as a settler or purchaser."* In other words he says that the rule as laid down by the land department confining a settler upon unsurveyed lands to the technical quarter section upon which he has improvements, does not apply in an action between a settler and a railway company. The secretary in his decision squarely decides this point, that the railway company is not entitled to the benefits of this rule.

> "That in the adjustment between conflicting settlement claimants, the notice given by improvements made upon a tract of land prior to the survey thereof is limited to the technical quarter section in which the same is shown to be upon survey is held in a long line of departmental decisions, but the railway company *is not in the position of a conflicting settlement claimant* and when making its selections it was bound to take notice of Hickey's improvements and to ascertain the land claimed by him." (Record, page 21, folio 43.)

In the case of the M. K. & T. Ry. Co. v. Troxel, 17 L. D. 122, it was held:

> "Land included within a valid settlement claim is not subject to *indemnity selection*, and the failure of the settler to file his claim within the statutory period will not operate to defeat the effect of said claim as against the company, *nor limit the extent of such claim to the particular tract on which the improvements are situated.*"

The honorable secretary, in the body of his opinion in this case, says:

> "The authorities cited by the commissioner and the local land officers arose between settlers claiming priority of right under the act of May 14th, 1880, and are not applicable to cases between settlement claimants and railway companies claiming under grants by acts of congress. If a valid settlement exists at the date of selection, it does not concern the railway company whether the applicant has filed within the time or not, *for the railway company does not occupy the position of a purchaser or settler.*"
>
> Emerson v. Central Pac., 3 L. D. 71.
>
> Schetke v. N. P. Ry., 5 L. D. 473.
>
> Central Pac. v. Tyler, 11 L. D. 445.

In the case of the St. P. M. & O. Ry. Co., in 9 L. D. 221, it was held:

> "A railway company does not stand in the position of a *purchaser*, and it cannot be heard to plead against a settler on public land under the pre-emption or the homestead laws that he has failed to perform his obligations to the government, for his claim is attached at the date of definite location."

The same principle is enunciated and followed in a very recent decision of the land department in the case of Bergman v. St. P. M. & M. Ry. Co., 33 L. D. 513, decided March 18th, 1905:

> "Rights acquired by settlement upon unsurveyed land, and duly and timely asserted upon the filing of the plat of survey, will, as against an intervening indemnity railroad company's selection, made under Act of Aug. 5th, 1892, be protected in its entirety even though the lands claimed may be in different sections, and the

> improvements of the settler be confined to the lands in one section."

This case is exactly in point and is especially important in that it cites, affirms, and follows the decision of the department in the controversy between Hickey and the railway company.

By the Act of August 5th, 1892, did congress intend to add to or in any manner change the requirements for acquiring a homestead claim under the Act of May 14th, 1880? Did congress intend to grant the railway companies the power to say to settlers:

> "Before you are entitled to hold your land as against us, you must not only show that you have complied with all the provisions of law, you must not only show that you have excluded all other settlers and kept your claim free from conflict with other settlement claimants, but you must also show that you gave us notice of the extent of your claim, either actual notice (i. e., oral or written), or by posting notices that we might have seen had we been settlers."

This is the logical meaning of the argument of the counsel for the defendant in this case. We submit that it is not the true construction of the Act of August 5th, 1892, and further, that such a construction is upon its face absurd.

Honorable Justice Miller, in the case of Kansas & Pac. Ry. v. Dunmeyer, 113 U. S. 629, it seems to us struck the keynote of the situation in this case when he said:

> "It is not conceivable that congress intended to place these parties (homestead and pre-emption claimants on the one hand and the railway company on the other) as contestants for the

land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with the interests to defeat their claims and to come between them and the government as to the performance of their obligations.

The reasonable purpose of the government undoubtedly is that which it expresed, viz: 'While we are giving liberally to the railway companies, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach.'"

H. & D. Ry. Co. v. Whitney, 132 U. S. 357.

Tarpey v. Madson, 178 U. S. 215.

"Such an entry attached to the land a right which the road cannot dispute on account of any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subsersive of the principles upon which the munificent railroad grants are based."

H. & D. Ry. Co. v. Whitney, 132 U. S. 357.

Tarpey v. Madson, 178 U. S. 215.

In the case of the Northern Pacific Company v. McCormick, 94 Fed. 932, the court said:

"A qualified settler who enters upon and improves unsurveyed public land with the intention of obtaining title thereto under the pre-emption laws has a claim thereon, which is a right of pre-emption, and which continues until three months after the map of survey of the land has been filed in the land office, unless the entry is sooner made, and where a settler

was so occupying and residing upon a tract of unsurveyed land at the time of the filing of the map of definite location of the line of the Northern Pacific Railroad which brought the land within the boundaries of its grant, although the settler has made no application for entry, such land was at that time subject to the pre-emption claim or right within the meaning of the reservation clause of the act making such grant, and the company acquired no title thereto."

St. P. M. & M. Ry. v. Greenhalgh, 26 Fed. 563.

Every case cited by the learned counsel in support of his proposition, with the exception of four cases (which we will refer to later), were cases arising in contests between two settlers, and not between a settler on the one side and on the other side a railway company, claiming under an act of congress whereby it is empowered to select only from the residum after the claims of settlers have been satisfied.

Under the ruling in the case of Elliott v. Neal, 4 L. D. 73, supra, the railway company was bound to take notice of the extent of Hickey's claim, and it cannot be heard to say that notice was not given it.

"C."

The burden of proof was on the railway company to show that it made careful inquiry as to the boundaries of Hickey's claim before risking the application to select this land.

Did the railway company do this? Did it inquire of Hickey as to the extent of his claim? Did

the railway company use good faith, and did it use diligence in ascertaining the extent of Hickey's claim. The Honorable Secretary, in the decision of February 11th, 1903, comments on this fact, and he says that 'the agent of the railway company who selected this land admitted that he found, saw and visited Hickey's house, and found it inhabited, but the owner away." (Rec., page 21, fol. 43.) Was this not sufficient to notify him that the owner might claim this land? Was it not the plain duty of the defendant company to ascertain the extent of Hickey's claim? But what does the railway company do? Instead of ascertaining the extent of Hickey's claim, the agent for the railway company carefully avoids asking anyone. If he had inquired of the neighbors, he might have easily ascertained the extent of Hickey's claim, and we claim that it was the plain duty of the railway company to ascertain if possible, the extent of Hickey's claim when the agent for the railway company found Hickey's house on this quarter section adjoining land which his company intended to select. As was stated in the secretary's decision of February 11th, 1903, the extent of Hickey's claim was well recognized by all his neighbors:

> "It is well to note that the witnesses offered at the hearing, namely, Frank Smith, and W. E. Mevers, both resided in the township in question, and close to the land in dispute during the year 1893, and were well apprised of Hickey's claim, for, when asked to give the exact description thereof, included in their answers all the lands covered by his application as presented. It thus seems that his claim

was well recognized by those residing in the neighborhood of the land in question as early as 1893." (Record, page 22, folio 43.)

The case of Ferguson v. McLaughlin, 96 U. S. 174, citedby counsel, was decided November 28th, 1877, three years before the passage of the homestead act of May 14th, 1880, before cited. Said case was decided under an entirely different law and an entirely different state of fact, and is therefore not applicable to the case at bar.

The same is also true of the case of the United States v. Central Pacific, 84 Fed. 88, this controversy arose and patent was issued to the railroad company long prior to the passage of the homestead act of 1880, and the law as enunciated in said case has no application here.

The other two cases relied on by counsel in support of his contention that Hickey's claim, as against the selection, should be restricted to the technical quarter section including his improvements, are, namely:

Brown v. Central Pacific, 6 L. D. 151.

Union Pac. v. Simmons, 6 L. D. 172.

In both those cases, however, the lands were in the primary or place limits of the railroad grant, and the limitations upon the grant were not the same as those attaching to the right of selection granted the Manitoba Company by the Act of 1892. Further, in neither case was the claimant against the railway company the person whose settlement was relied upon to defeat the grant, nor was it shown that such prior settler had ever filed any

formal application in the land department including the tract there in question within his claim. (Record, page 22, folio 44.)

"D."

The land in controversy was not subject to selection by the railroad company, as it was not such land as congress contemplated should be selected under the act of August 5th, 1892.

Under the act of August 5th, 1892, the Manitoba Company was granted the right to select "an equal quantity of non-mineral *public lands* * * * of the United States not reserved and to which no *adverse right* or *claim* shall have attached or have been initiated at the time of making of such selection." Under said grant or clause the burden of proof is on the railroad company to show: First, that the land was PUBLIC land and *not* SEGREGATED; Second, that it was non-mineral; Third, that it was not reserved; and, Fourth, that no adverse *right* or *claim* had *attached* or been *initiated*, and until it had established the above it could not acquire any right therein etiher legal or equitable.

In the case of Bardon v. Northern Pacific, 145 U. S. 535, the secretary said:

> "By *public* land is meant such land as is open to sale or other disposal under the general law; land to which any claim or rights of others have been attached does not fall within the description of public land. A grant of public land only applies to lands which are at the time free from exstiing clams in the ab-

sence of any expressed provisions indicating otherwise."

Mann v. Tacoma Land Co., 153 U. S. 273.

Newhall v. Singer, 92 U. S. 761.

Leavenworth L. G. Ry. v. U. S., 92 U. S. 733.

Doolan v. Carr, 125 U. S. 618.

In the case of Cosmos Exploration Co. v. Grey Eagle Oil Co., 12 Fed. 4, the court says:

> "Public lands are vacant and open to settlement, and therefore are subject to selection in lieu of relinqusihment forest reserve lands, when they are unoccupied by others, are free from other claims of record, and are non-mineral in character, *and it devolves upon the person making the selection to establish such facts by proof.*"

Grants of public lands by the sovereignty to corporations or individuals are construed strictly as to the grantee and nothing shall be taken by implication.

Leavenworth, Etc. Ry. v. U. S., 92 U. S. 733.

U. S. v. Arredondo, 6 Pet. 691.

Rice v. Minn. Etc. Ry., 1 Black (U.S.) 358.

Shivley v. Bowlby, 152 U. S. 1.

Grants in favor of railroad company will be strictly construed.

Winona Etc. Ry. v. Barney, 113 U. S. 618.

Wis. Cent. Ry. v. U. S., 164 U. S. 190.

U. S. v. Oregon Etc. Ry., 164 U. S. 526.

II.

"A."

HICKEY HAVING FILED HIS HOMESTEAD APPLICATION IN SEASON, HIS HOMESTEAD CLAIM ATTACHED, AND HIS RIGHT RELATED BACK TO THE DATE OF SETTLEMENT. THE LAND WAS EXCEPTED FROM THE RAILWAY COMMPANY'S SELECTION, AND COULD NOT BE SELECTED BY IT.

Let us refer to the transcript for a moment, and see how the record stands in this case. *First*, the railway company did not file its application to select until December 31st, 1895, (Record, page 13, folio 26); *Second*, Hickey, in March, 1893, settled upon this land and continued to reside thereon and improve the same until the time of his death in 1897 (Record, page 13, folio 26; Record, page 21, folio 26); *Third*, the town was open for entry on July 22, 1896, and on said day Hickey filed his homestead application embracing all the land in controversy and alleging settlement thereon in 1893. (Record, page 13, folio 27.)

The lands described in said application were Lot 12 of Section 3, and Lots 9, 10, 14 and 15 of Section 4, T. 60, R. 24. Said Lots 14 and 15 are on the north shore of a lake, and are the north half of southeast quarter of Section 4. Said Lots 9 and 10 are directly north of said Lots 14 and 15, and are the south half of northeast quarter of Section 4. Lot 12 is directly east of Lot 9, and is the southwest quarter of the northwest quarter of Sec.

3. It is all continuous and in one compact body, and contains no more than 160 acres.

This record must be the basis of the decision in this case.

In this connection we will quote from the United States Supreme Court, in the case of Tarpey v. Madson, 178 U. S. 215, 222:

> "It is undoubtedly true that one ocupying land with a view of pre-emption is given thirty days within which to file with the Register of the Land Office his declaratory statement."
>
> (Revised Statutes, Sec. 2264.)

Since 1880 the same right has been possessed by one desiring to make a homestead entry. (Act of May 14, 1880; 21 Stat. Ch. 89, Sec. 3.)

> "The ruling of the land department has been that if a homestead settler shall fully comply with the law as to continuous residence and cultivation the settlement defeats all claims intervening between its date and the date of filing hishomestead entry."
>
> Sturr v. Beck, 133 U. S. 541.

In the case of Nelson v. Northern Pacific Ry., 188 U. S. 108, it was held:

> "If a qualified entryman has made settlement upon indemnity lands prior to their survey, he may subsequently when survey has been made, enter the lands under the homestead laws, and his rights are then superior to those acquired by the railroad company under any selection by it made after the date of settlement."
>
> Oregon Etc. Ry. v. U. S. 189 U. S. 103.
>
> Oregon Etc. Ry. v. U. S., 189 U. S. 116.
>
> Cedar Rapids Etc. Ry. v. Jewell, 61 Iowa 415.

In the case of the Kansas & Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629, the court says:

> "Of all the words in the English language, this word 'attached' was probably the best that could be used. It does not mean mere settlement, residence, or cultivation of the land, but it means a proceeding in the proper land office by which the inchoate right to the land was initiated; it meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation. *With the performance of these conditions the company had nothing to do.*"
>
> H. & D. Ry v. Whitney, 132 U. S. 357.
>
> U. S. v. Oregon Etc. Ry., 133 Fed. 953.

> "The acceptance of a declaratory statement and entering the same on the books of the local land office is an official recognition of the pre-emption or homestead claim."
>
> Tarpey v. Madson, 178 U. S. 215.
>
> Ard v. Brandon, 156 v. U. S. 536.

The honorable secretary in his decision of Feb. 11th, 1903, decided the vital question in this case, viz: *Did Hickey initiate a claim to this land within the meaning of the Act of Aug. 5th*, 1892, *when he held*:

> "The entire matter considered, it is the opinion of this department that the record made in this case shows that Hickey had, prior to the selection of the land by the railway company, initiated a claim under the homestead laws *to the entire tract embraced in his application; that such right was duly and timely asserted and was a bar to the selection of said land by the Manitoba Company*, under the Act of Aug. 5th, 1892. (Record, page 22, folio 45.)

In the case of Ard v. Brandon, 156 U. S. 567, it was held:

> "If one qualified to make a homestead entry goes upon public land with a view of making a homestead thereon, and does all that the statutes require to procure a homestead, the law protects him therein, and his rights are superior to those of the railroad company which subsequently selects the land as indemnity under a grant from congres, receiving a patent therefore."

As to the meaning of the words 'claims' and 'rights,' see:

Whitney v. Taylor, 158 U. S. 92.

Northern Pac. v. McCormick, 94 Fed. 932.

Wood v. R. R. Co., 104 U. S. 329.

Newhall v. Sanger, 92 U. S. 761.

B. & M. Ry. v. Abink, 15 N. W. 317.

"B."

The Hickey heirs fully completed the homestead entry of Jerry Hickey, and we contend that completion of entry does not mean making final proof.

It is admitted in this case (Record, page 22, fol. 45-46), that on June 4th, 1903, Mrs. Hickey duly filed the proper application, which was in lieu of the homestead aplication duly filed by Jerry Hickey on July 22, 1896. She also filed the affidavits required by the homestead laws, and duly paid her filing fees and commissions demanded of her by the register and receiver, and thereupon the receiver's receipt was duly issued to her.

We submit that this constituted a completion of the Jerry Hickey homestead entry.

In H. & D. Ry. Co. v. Whitney, 132 U. S. 357, the court says:

> "Under the homestead laws three things are needed to be done in order to constitute an entry on public lands: *First*, the applicant must make an affidavit setting forth the facts which entitle him to make such entry; *Second*, he must make formal application; *Third*, he must make payment of the money required. When these three requisitions are complied with, the entry is made and the land is entered."

In the case of Choteau v. Pope, 12 Wheaton, 586, the court says:

> "The words 'entry' and 'filing' are technical terms having a well defined meaning, and are employed in the various acts pertaining to the disposal of the public domain to indicate the act by which an *individual acquires an inceptive right* to a portion of the public lands under the general land laws."

In the case of the United States v. the Oregon Etc. Ry., 133 Fed. 957, it was held:

> "That when homestead application is made and the prescribed affidavits are filed, and the filing fees paid, the applicant has acquired a VESTED right."

See, also,

Sturr v. Beck, 133 U. S. 541.

In the case of U. S. v. Turner, 54 Fed. 228, it was held:

> "A homestead entry operates as an appropriation of the land covered by it and segregates this tract from the mass of the public domain. That the homestead entry gives the homesteader the exclusive right and pos-

session, not only against individuals, but against the government itself."

In Gilbur v. Spearing, 4 L. D. 463, the secretary says:

> "The entry is complete and in contemplation of law the land is entered from the moment when the application, affidavit and legal fees are placed in the hands of the local officers."

In Iddings v. Burns, 8 L. D. 226, the secretary says:

> "There are three essential elements of a homestead entry: The application, the affidavit, and the payment of money; and when the application is presented, the affidavits made, and the money paid, the entry is made and completed and the right is vested."

Again, in the court's decision of March 17th, 1905, in Donohue v. Railway Company, he says:

> "For it seems that as soon as a favorable decision was secured upon the Hickey contest, *original homestead entry was completed of the land.*" (Record, page 29, folio 59.)

"C."

By reason of the settlement made by Hickey, and the completion of entry by him and his heirs, the land in controversy was segregated from the mass of public land, and was not open for selection by the railway company, and upon subsequent relinquishment filed, did not inure to the benefit of the railway company, but reverted to the government as public lands open for entry.

The case of Kansas & Pacific Ry. Co. v. Dun-

meyer, 113 U. S. 629, is on all fours in line with this case. In that case the homestead claim has been made and filed in the land office by one Miller; subsequent to the location he abandoned his entry and took a title under the railway company, and his homestead entry was canceled. One Dunmeyer then entered the land under the homestead law, claiming that by the cancellation or abandonment it had passed back to the mass of public lands, and was not brought within the grant, and upon that claim ousted the defendant in error, who afterwards brought an action against the railway company for a breach of covenant, obtaining a judgment in the court below, which was afterwards affirmed by the Supreme Court of the United States. The court said, Honorable Justice Miller delivering its opinion:

> "The record shows that on July 25th, 1866, Miller made a homestead entry on this land, which was in every respect valid. It also shows that the line of definite location of the company's road was first filed Sept. 21, 1866 * * * In the language of the act of congress this homestead claim had attached to the land and it therefore did not pass by the grant. Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation. *With the performance of these conditions the company had nothing to do* * * * It is argued by the company that although

Miller's homestead entry had attached to the land within the meaning of the excepting clause of the grant before the line of definite location was filed by it, yet when Miller abandoned his claim so that it no longer existed, the exception no longer operated, and the land reverted to the company; that the grant, by its inherent force, reasserted itself and extended to or covered the land as though it had never been within the exception.

We are unable to perceive the force of this proposition. * * * No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road and others with grants in similar language have more than once passed through military reservations for stores and other purposes which had been given up or abandoned as such reservations and were of great value. Nor is it understood that in any case where lands had been otherwise disposed of their reversion to the government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emption right had attached? Did congress intend to say that the right of the company also attaches and whichever proved to be the better right should obtain the land? It is not conceivable that congress intended to place these parties (homestead and pre-emption claimants on the one hand and railway companies on the other) as contestants for the land, with the right in each to require proof from the other of complete performance of his obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation with the interest to defeat their claims and to come between them and the government as to the performance of their obligations."

The court further holds in said case:

> "The subsequent failure of the person making such claim to comply with the acts of congress concerning residence, cultivation and building on the land, or his actual abandonment of the claim, *does not cause it to revert to the railway company* and become a part of the grant. The claim having attached at the time of filing the definite lines of the road, it did not pass by the grant, but was by its express terms excluded, and the company had no interest, reversionary or otherwise, in it."

The case of H. & D. Ry. Co. v. Whitney, reported in the 132 U. S. 357, followed the Dunmeyer case. The facts in the Whitney case are briefly as follows: On March 7th, 1867, the railway company perfected its grant, but prior thereto one Turner had made a homestead entry to the land involved. Thereafter, but subsequent to the railway grant, the entry of Turner was declared absolutely void. In said case the court held, Justice Lamar delivering the opinion of the court, that notwithstanding the fact that Turner's homestead entry was invalid and void, it did except the land from the operation of the railroad grant, and that upon the cancellation of that entry the tract in question did not inure to the *benefit of the railway company, but reverted to the government, and became a part of the public domain, subject to appropriation by the first legal applicant.*

In the case of Whitney v. Taylor, 158 U. S. 85, the lands were within the granted limits of the Central Pacific Railway Company, and the plain-

tiff claimed under and by virtue of mesne conveyances from that company. The defendant claimed title from the government on facts as follows: Prior to the time when the line of the railway company was definitely fixed, one Jones filed in the land office his pre-emption declaratory statement, but never made a settlement on the land, and a short time after making his filing he left the country to visit England and he never returned. His entry was subsequently commuted, and a patent was issued to him. Held:

> "The filing made by Jones segregated the land from the mass of public land, and upon cancellation of said entry the land reverted to the government and became a part of the public domain, and subject to entry by the defendant."

In Wilcox v. Jackson, 38 U. S., 3 Peter, 498, the court says:

> "The doctrine that a tract of land lawfully appropriated becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, has been reaffirmed and applied by this court in such a great variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country."

In the case of Sturr v. Beck, 133 U. S. 541, the court says:

> "Under section 2297 of the Revised Statutes it is provided that upon change of residence or abandonment as therein mentioned before the expiration of the five years, 'then

and in that event the land so entered shall revert to the government."

In Witherspoon v. Duncan, 71 U. S. 210, the court says:

"Lands originally public cease to be public after they have been entered at the land office."

And the court further holds that this applies as well to homesteads and pre-emption as to cash entries. In either case, the entry being made, the particular tract entered thereby becomes segregated from the mass of public lands, and takes the character of private property. "See Sturr v. Beck, 133 U. S. 541."

In the case of the H. & D. Ry. Co. v. Whitney, above cited, the court says:

"In the light of these decisions the uniform practice of the department has been to regard lands upon which an entry has been made as appropriated and withdrawn from subsequent homestead entry, pre-emption, sale or grant, until the original entry be canceled or declared forfeited, *in which case the land reverts to the government as part of the public domain and becomes again subject to entry under the land laws.*"

Oregon, etc., Ry. v. U. S., 190 U. S. 186;

In U. S. v. Turner, 54 Fed. 228, the court says:

"A homestead entry operates as an appropriation of the land covered by it, and segregates this tract from the mass of the public lands."

De Lacy v. N. P. Ry., 72 Fed. 726;

In the case of St. P., M. & M. Ry. Company v. Leach, 3 L. D. 506, it was held that the entries of Merritt and Scofield, though voidable, exempted the land covered thereby from withdrawal, and that upon cancellation the land then and there became government land and part of the public domain, and subject to entry by the first legal applicant.

In the case of Boumhoefer v. Mpls. & M. Ry. Co., 22 L. D. 257, it was held:

> "Land embraced within the settlement claim of a qualified pre-emptor at date of definite location is excepted from the grant even though such a claim is never asserted by filing or entry."

In the case of Fish v. N. P. Ry. Co., 23 L. D. 15, it was held:

> "An uncanceled pre-emption filing of record at the date when a railroad grant becomes effective excepts the land covered thereby from the operation of the grant even though at such time the statutory life of the filing has expired."
>
> "The status of a tract of land at the date of its selection determines the right of the company thereunder, and if at such time there exists an adverse claim sufficient to bar selection, the subsequent abandonment of such adverse claim *cannot inure to the benefit of the railway company under its selection.*"

N. P. Ry. Co. v. Loomis, 21 L. D. 398;
C. St. Paul, etc., Ry. Co., 9 L. D. 221;
Southern Pac. v. Brown, 9 L. D. 173;
N. P. Ry. Co. v. Kerry, 10 L. D. 290;
N. P. Ry. Co. v. Potter, 11 L. D. 531;
Hudson v. Central Pac., 15 L. D. 112;
M. K. & T. Ry. v. Troxel, 17 L. D. 122;

The doctrine that a tract of land lawfully appropriated becomes thereafter severed from the mass of public lands, and if relinquished or abandoned reverts to the government, applies as well to *indemnity lands* as it does to granted lands. See:

Nelson v. N. P. Ry., 188 U. S. 108;
Oregon Ry. v. U. S., 189 U. S. 103;
DeLacy v. N. P., 72 Fed. 726;
Fish v. N. P., 23 L. D. 15;
N. P. Ry. v. Loomis, 21 L. D. 398;
St. P. & Omaha Case, 21 L. D. 423;
H. & D. Ry. v. Christianson, 22 L. D. 257;
State California v. So. Pac., 27 L. D. 542;
Prince Inv. Co. v. Eheim, 55 Minn. 36;
St. Paul & Soo City v. Ward, 47 Minn. 40.

The court in the case of Barney v. Ry. Co., 117 U. S. 228, points out the only distinction between granted lands and indemnity lands:

> "In the construction of land grant acts in aid of railroads there is a well established distinction observed between granted lands and indemnity lands; the former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of road filed in the land department as of the date of the act of congress; the latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection."

It is well settled that as regards to indemnity or lieu lands the rights of the railroad company

do not attach by relation as to the date of the act but only when the selection of the specific sections are actually made in the manner prescribed.

Barney v. Winona, etc., Ry., 117 U. S. 228;
Soo City Ry. v. Chicago, etc., Ry., 117 U. S. 406;
U. S. v. McLaughlin, 127 U. S. 428;
Wis. Central Ry. v. Price County, 133 U. S. 496;
So. Pac. v. Bell, 133 U. S. 675;
Gertgens v. Connor, 191 U. S. 237;
U. S. v. Anderson, 194 U. S. 394;
Hunburg v. Avery, 195 U. S. 480;
St. P., M. & M. Ry. v. Sage, 71 Fed. 40;
Wis. Cent. Ry. v. Forsythe, 43 Fed. 867;
Hewitt v. Schultz, 180 U. S. 139;
St. P. & Soo City Ry. v. Winona, etc., Ry., 112 U. S. 720;

In the Southern Pacific Ry. Co. Case, 21 L. D. 423, the secretary says:

> "The lands within the primary and indenity limits are both *granted;* the partticular difference between the two being the time of the attachment of the rights. Within the primary limits the company's right attaches upon definite location, while within indemnity limits it does not attach until selection, but any claims that would serve to prevent the attachment of rights under the grant to a tract within primary limits because existing at the date of definite location would by parity of reasoning, if existing at the date of selection of the indemnity land, serve as a bar to the acceptance of such selection."
>
> "Lands occupied and cultivated by qualified

settlers entitled to make entry thereof are not subject to indemnity selection."

H. & D. Ry. Co. v. Christenson, 22 L. D. 257.

In the case of State v. California v. So. Pac., 27 L. D. 542, the facts were:

The railroad company duly offered for filing at the land office its indemnity selections, which were noted on the books of the land office, and then rejected, because they conflicted with a homstead entry, and the railroad company appealed (which is the situation in the case at bar, Record, page 14, folio 28).

While said matter was pending on appeal, the State of California secured a relinquishment from the homestead claimant and immediately filed same and made entry of the land itself.

Held: "A railroad indemnity selection tendered for land that is embraced at such time, within a prior existing homestead is properly rejected, and an appeal from such action secures no right that will attach on the subsequent relinquishment of said homestead entry."

In the case of the N. P. v. Loomis, 21 L. D. 398, it was held:

"If at the date of selection or application to select such a claim had attached to the land as would bar the selection, the said selection must be rejected, and the subsequent abandonment of such aderse claim cannot inure to the benefit of the railway company under the selection so made during the existence of the same, but in order to make a valid selection of land within the indemnity limits, it must pre-

sent its application at a time when the land is free from adverse claims."

M. K. & T. Ry. Co. v. Beal, 10 L. D. 504.

Hensly v. M. K. & Ry., 12 L. D. 19.

Bright v. N. P. Ry. Co., 6 L. D. 613.

H. & D. Ry. Co. v. St. P. M. & M. Ry. Co., 13 L. D. 535.

D.

To except this land from the operation of the railway company's selecton, it was not necessary for the homestead claimant to make his final proof.

When the heirs of Jerry Hickey filed the homestead affidavit, paid the filing fees and received the receiver's receipt therefore (R. P. 22, fol. 45), the entry was then completed.

H. & D. Ry. Co. v. Hastings, 132 U. S. 357.

Chotean v. Pope, 12 Wheaton 586.

U. S. v. Ore Etc. Ry., 133 Fed. 957.

Sturr v. Beck, 133 U. S. 541.

Gilbur v. Spearing, 4 L. D. 463.

Iddings v. Burns, 8 L. D. 226.

Donohue v. Ry. Co. (R. p. 29, folio 59), wherein the secretary says:

> "As soon as a favorable decision was secured upon the Hickey contest, *original homestead entry was completed on the land.*"

The case of the Northern Pacific v. Dean, 27 L. D. 462, cited by counsel, has no application to the facts in this case, for the reason that in the Dean case he merely made application to enter certain lands, which application was rejected. An appeal

was then taken and the secretary decided that the homestead application was improperly rejected, and directed "they will threfore be notified of their rights to complete their filings upon their applications heretofore presented, and thereupon the company's selections will be cancelled."

The applicant, Dean, was duly notified to complete his filing, but he failed to respond. He never filed his application; did not file the other affidavits; did not pay the filing fees, and the receiver's receipt was never issued. In other words, the entry was never completed, but abandoned, and it may well be said that the land had not been segregated from the mass of public lands.

The facts in the foregoing case are entirely different than in the case at bar, wherein there was a completed entry in every detail. (Record, page 55, folio 111.)

The facts in the case of Northern Pacific v. Fly, 27 L. D. 464, are similar to the Dean case, and have no application to the case at bar. The facts in the Fly case are briefly as follows: The land described is within the indemnity limits of the grant to the Northern Pacific Railway Company, and was covered by an indemnity selection which the local officers allowed to go on record on March 20, 1884. Prior to the presentation of such selections, one Kincaid tendered a timber culture application for the land, which application was, by the local officers, rejected for conflict with the indemnity withdrawals made on account of the grant. Upon appeal the decision of the local officers

was reversed, and the secretary held that "upon completion of entry by Kincaid the company's selection will be cancelled." Although duly notified, Kincaid failed to complete his timber entry, and abandoned the same. In this case, it will be observed, the situation was the same as in the Dean case; there was no entry of record and consequently the land was never segregated.

Counsel places great stress on the decision of the secretary in the Dean case, supra, and therefore a word on that decision may be necessary. It will be noted that the honorable secretary, after quoting the law as laid down in the Loomis case, 21 L. D. 398:

> "The status of a tract of land at the date of its selection determines the right of th company therein, and if at such time there exists an adverse claim sufficient to bar selection, the subsequent abandonment of such claim cannot innure to te benefit of te company under its election";

followed it with this:

> "*While adhering to the views, thus quoted,* a further distinction might be pointed out between lands within the primary and indemnity limits; i. e., that the former when once excluded from the grant, remains in that condition, whereas as to the latter the status of the land at the date of its selection determines the company's right at that time only. That is to say, indemnity lands are subject to selection at any time when they are free."

Now, then, there is no question but what the honorable secretary was right in this decision, for this reason: We admit that at any time that the land is free from a filing the railroad company have

the right to file their indemnity lieu selections thereon. In other words, when Mrs. Hickey filed her relinquishment the land was then public land, open to entry or selection by the first person who aplied therefore. If the railroad company at that time (before defendant in error filed his timber and stone entry) had filed a new selection upon this land it would have had a perfect right to select the same because the land would then be free; and that is the whole meaning of the secretary's decision in the Dean case.

The case of the Oregon & California Ry. Co. v. U. S., does not modify the doctrine laid down in the H. & D. Ry. Co. v. Whitney, nor in Whitney v. Taylor, and the other case cited in the opinion of the state court. In that case (Oregon & Cal. Ry. v. U. S.), it appears that "the land was abandoned fifteen years before the lands were selected by the company, and nothing remained to indicate that the land was reserved except the donation notification in the office of the surveyor general." The most that can be claimed for this case is that it held that the railway company might show that the apparent claim arising from the filing of the donation notification was not in fact a subsisting claim and that the same had long been abandoned before the selection by the railway company.

Under the secretary's decision of Feb. 11th, 1903 (Record, page 22, folio 45), it was the plain duty of the local officers to cancel the attempted filing of the railway company, and if the order of the honorable secretary had been followed by the gen-

eral land office the rights of the railway company would then and there have been canceled *ipso facto;* but we contend that it was not even necessary to cancel the claim of the railway company, on the record for the reason it never had any lawful rights to this land, being that it was barred and excluded therefrom by the attached homestead rights of Jerry Hickey, and its filing was canceled as a matter of law.

N. P. Ry. Co. v. Reed, 27 L. D. 651.

The homestead entry being completed (and it must be conceded it was), that except the lands from selection by the railway company, and with the duty of the homestead claimant to the goernment as to settlement, occupation, final proof, etc., the railroad company had nothing whatever to do.

Quoting the words of Justice La Mar, in the case of te H. & D. Ry. Co. v. Whitney, 132 U. S. 365:

> "Lands originally public cease to be public after they have been entered at the land office and certificate of entry has been obtained; and this applies as well to homestead and preemption as to cash entries. In either case the entry being made and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of public lands, and takes the character of private property. The fact that such an entry may not be permitted by the land office on account of any alleged defect therein or may be canceled or declared forfeited on account of non-compliance with the law, or if it is declared void after a patent has issued on account of fraud in a trial proceeding for that purpose in the courts, is an incident inherent in all entries of public lands.
>
> In the light of these decisions the almost uniform practice of the department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated and withdrawn from subsequent home-

> stead entry, pre-emption settlement, sale or grant, until the original entry be canceled or declared forfeited, in which case the land reverts to the government as a part of the public domain and becomes again subject to entry under the land laws."

In the case of the Kansas Pacific Ry. v. Dunmeyer, 113 U. S. 639, the court said:

> "It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation; with the performance of these conditions the company had nothing to do."

Witherspoon v. Duncan, 71 U. S. 210.

Carroll v. Safford, 44 U. S. 441.

Wilcox v. Jackson, 38 U. S. 498.

In Perkins v. Cent. Pac. R. R. Co., 1 L. D. 357, the secretary says:

> "The railway company's rights to the land is not held in abeyance to await the default of the settler, but the title vests or does not vest at once, and so far as regards the land in which the title does not vest at once, the claim of the company is at an end."

In the same case the secretary says it was the intention of congress that only such unoccupied lands as were not held under any claim recognized by the government should pass under the grant.

Hickey's heirs having completed the entry of Jerry Hickey Record, page 33, fol. 67), the right related back to the date of entry (Sec. 3 of the Act of May 14th, 1880), and segregated the land from the mass of public lands for all times, and

the rights of the railway company (if it ever had any) were at an end.

Nelson v. the Nor. Pac. Ry., 188 U. S. 108.

Ore. Etc. R. R. Co. v. U. S., 189 U. S. 103.

Ore Etc. R. R. Co. v. U. S., 189 U. S. 116.

In the case of Sturr v Beck, 133 U. S. 541, Justice Fuller, in construing Section 3 of the Act of May 14th, 1880, says:

> "The ruling of the land department has been that if the homestead settler shall fully comply with the law as to continuous residence, cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry. * * * Under Section 2297 of the Revised Statutes it is provided that upon change of residence or abandonment as therein mentioned before the expiration of five years, 'then and in that event the lands so entered shall revert to the government.'"

In said case Justice Fuller quoting with approval from the opinion of the Attorney General McVeagh in an opinion to the secretary of war, July 15th, 1881, says:

> "Where a homestead entry of public land has been made by a settler, the land so entered cannot, while such entry stands, be set apart by the president for a military reservation, even prior to the completion of full title in a settler. Upon the entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land subject to the future performance by the settler of certain conditions (in the event of which he becomes

> invested with full and complete ownership) and until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government."

We contend that the amount the heirs of Jerry Hickey completed their entry it cut out every right of the railroad company, and no order of the land department cancelling said entry was necessary. It was dead ipso facto by reason of the law.

The secretary's decision of Feb. 11th, 1903, was a final judgment as to Hickey's right to this land, and said judgment took effect the moment the heirs of Hickey completed the entry to the land which was on June 4th, 1903.

It was never the intention of congress, the courts, or the secretary of the interior, that the railroad company's selection should continue thereafter as a "float" to hover over this land with this great corporation as a watch-dog to compel the entryman to perform his obligations to the government. Under the decision of the land department to the effect *"that upon completion of entry by the heirs of Hickey the rights of the railroad company will be canceled"*; the very moment the heirs of Hickey completed the entry said final judgment took effect and the homestead rights then and there vested. The claim was initiated under and by virtue of the laws of the land and the rules and practices of the land department on the day Hickey first settled on the land, which was in March, 1893, and no subsequent rules, decisions, or practices could divest him of the rights of property he then secured, or

deprive him of his equitable or legal rights which he then acquired.

Sturr v. Beck, 133 U. S. 541.

The moment Hickey's application was entered on the tract index his rights 'attached.' Did congress intend to say by the Act of August 5th, 1892, that the rights of the railroad company also attached?

The position taken by counsel is that notwithstanding Hickey's attached right and the segregation of the land, the failure of the land department to formally cancel on the record the attempted filing by the railroad company the selection was thereby made a 'floating right" which took effect immediately upon restoration of the land to the public domain. Such a rule and practice if it existed would be pernicious and in the teeth of the policy and provisions of the land laws of the United States, for the reasons stated by Justice Miller in the Dunmeyer case. It was pernicious because it gave a preference over the citizens of the United States to a sentinel stationed in the land office at Washington, and presented facial opportunities for securing mischievious and scandalous machinations. It was inconsistent with the policy and terms of the land laws because it permitted the acquisition of land by this great corporation without regard to the state of the record and without regard to the statutes of the United States, which provide that,

> "the state of the title and of the claims of public lands are always to be on record and

> open to the inspection of the people in the local land office, so that every citizen shall thus have equal notice of opportunities to obtain and equal chance to secure any tract of public land in his district." (Revised Statutes 2223, 2247, 2295.)

The words of Justice Miller in the Dunmeyer case, 113 U. S. 629, are so applicable here that I cannot help quoting them:

> "Did congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land? It is not conceivable that congress intended to place these parties (homestead preemption claimants on the one hand and the railway companies on the other) as contestants for the land, with the right in each to require proof from the other of complete performance of his obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation with the interest to defeat their claims and to come between them and the government as to the performance of their obligation."

In the case of the N. P. R. R. Company v. Reed, 27 L. D. 651, the secretary says:

> "Under a judgment holding an entry subject to the right of a railroad company to make indemnity selection of the land, the subsequent allowance of such selection works *in effect a cancelation of the entry then of record, and the validity of such selection is not affected by the fact that the entry is not formally canceled on the record.*"

The case which is particularly in point and we claim is decisive of this point in the case, is that of the State of California v. the Southern Pacific

Ry., 27 L. D. 542, supra, and which case was decided subsequent to the Dean & Fly cases, cited and relied on by counsel. In the case cited, the facts were:

The railroad company duly offered for filing at the land office its indemnity selections, which were noted on the books of the land office, and then rejected, because they conflicted with a homestead entry, and the railroad company appealed (which is the situation in the case at bar).

While said matter was pending on appeal, the State of California secured a relinquishment from the homestead claimant and immediately filed same and made entry of the land itself.

> Held: "A railroad indemnity selection tendered for land that is embraced at such time, within a prior existing homestead is properly rejected, and *an appeal from such action secures no right that will attach on the subsequent relinquishment of said homestead entry.*"

The secretary, in his decision of Feb. 11th, 1903, meant just exactly what he said, no more and no less, and when he used the words "upon the completion of entry by the heirs of Hickey the rights of the railway company will be canceled,' he meant that just as soon as the heirs put the homestead filing of record it would cancel *ipso facto* every shadow of right claimed by the railway company. If he meant, as is claimed by the counsel, that this order should be interlocutory and that the railway company's selection should not be canceled until Hickey's heirs had made final proof and a patent

was issued to them, that part of his order would be a nullity, for the reason the secretary could not by order, or otherwise *limit the vested rights of the homesteader not contemplated by the homestead laws. Furthermore the secretary could not enlarge the rights or privileges of the railroad company under the grant.*

The intention of congress was fully and plainly set forth in its act of August 5th, 1892, and the land department could not, even if it so intended, read anything into the act not contemplated by congress.

In the case of Wood v. Railway Company, 149 U. S. 529, supra, the court said:

> "There is no authority to import a word into the statute to change its meaning."

In the case of Burfenning v. C., St. P., M. & O. Ry., 163 U. S. 326, the court said:

> "The action of the land department cannot override the expressed will of congress or convey away lands in disregard or in defiance thereof."

We contend that the moment the heirs of Jerry Hickey completed the entry which was on June 4th, 1903, every right and claim of the railroad company were then and there canceled *ipso facto*, and no order of the land department canceling said entry was necessary. The attempted filing was dead and canceled as a matter of law, and we further contend that the land department could not even by express order breathe new life into said dead selection.

Using the language of the Supreme Court of

Minnesota (Record, page 53, folio 107):

> "The rights of the railway company were determined by his (the secretary) order. The terms of that order suspended its right until the homestead entry should or should not be completed. They are not to be distorted into securing a further suspension until the homesteader had not only completed his entry in accordance with its terms, but also had taken further steps not referred to in that order nor required by it. The decision of the land department was *res adjudicata* as to the rights of the railway company. In the second place the order could not legally have given the defendant's selection the effect of a lien or claim surviving the completion of the adverse homestead entry and operating in defendant's favor as a sort of 'shifting use' in case of subsequent abandonment or relinquishment of the homestead right. This is obvious from its mere statement, and is clear upon authority."

III.

"A"

In decreeing the title of this land in defendant in error, the state court was right and its decision was just and equitable.

In conclusion we will say a few words by way of answer to certain insinuations (nothing else as there is no evidence to sustain them) thrown in by the counsel on pages 30 and 31 of brief.

Counsel on page 30 says:

> "It nowhere appears in the record herein that Mrs. Hickey was ever in the State of Minnesota, or that she ever resided upon or cultivated the land claimed."

Counsel is fully aware that the homestead laws

do not require the heirs of a deceased entryman to reside on the land (Section 2291, Rev. Stat.), and as to cultivation, and keeping up the improvements, it nowhere appears that she did not, and in the absence of proof it must be presumed that she did.

But whether she did or did not, it is immaterial in this case, for the reason the question as to whether or not she performed her obligations to the government by residence, cultiation, etc., "*was a matter resting solely between her and the government, and with the performance of these conditions the company had nothing to do.*"

Kansas & Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629.

H. & D. Ry. Co. v. Whitney, 132 U. S. 357.

The land had been otherwise appropriated by the United States when the railroad company attempted to secure it by selection. As before stated, the railway company had no vested right in this or in any other particular tract of land until it made its selection and consequently Hickey's alleged failure to perform his obligations to the government was no concern of and not fraud upon it. The general government only having the right to otherwise dispose of the land pending a selection can question the bona fidas of the Hickey entry.

H. & D. Ry. v. Whitney, 132 U. S. 357.

Kan. & Pac. Ry. v. Dunmeyer, 113 U. S. 629.

There is certainly nothing to sustain the suggestion that this claim had been abandoned, and it is certainly very significant that this question of good faith was raised for the first time in the state su-

preme court, and it is certainly very plain to any one why it was then and is now raised, viz: *It is an underhanded attempt on the part of counsel to poison and prejudice the mind of this court against the rights of the defendant in error.*

The counsel in his brief, on pages 31-33 and 42, quotes from the secretary's decision of December 16, 1904, and of March 17th, 1905, and in answer thereto I wish to take but small space.

The assistant secretary based his decision of Dec. 16th, 1904, on the following: "Instead of making completion of the entry, it appears that she filed *a new application as heir* and made the original entry of the land." (See Record, page 28, fol. 57.)

Then when the motion for a review and the rehearing was made (Record, page 28, fol. 57), and the record submitted to said assistant secretary, he was forced to admit that "*The original homestead entry of Jerry Hickey was completed of the land*" (Record, page 29, folio 59), and with this admission forced from him, the basis for his decision of December 16th, 1904, was shattered and he was then forced to adopt some other reason and being unable to find any, he was forced to place it on the grounds of equity and refused to consider the points raised on motion for review. (Record, page 30, folio 60.)

Again quoting from the decision of the State Supreme Court (Record, page 55, folio 112):

> "There was no principle of equitable jurisprudence raised, or considered, nor was it in-

volved. No investigation was made, nor should have been made, as to equity used in a colloquial sense. If Donohue's good faith was relevant it should have been made the subject of judicial inquiry and not of personal conjecture. That we are satisfied his action was in the protection of the interest of the Hickey heirs is as wholly immaterial to the merits of the controversy, as the impression of the land department at a greater distance from the scene of controversy that the land was not desired by the original settlers and those dependent on, and claiming through them."

"B."

The defendant in error has shown that by the law properly administered the title should have been awarded to him.

We have shown that Hickey prior to the selection of this land by the railway company had initiated a claim under the homestead laws, to the entire tract embraced in his homestead application; that said right was duly and timely asserted and was a bar to the selection thereof by the railway company (Record, page 33, folio 67). Also (page 22, folio 45.)

We have further shown that Mrs. Hickey on June 4th, 1903, duly completed the homestead entry before made by Jerry Hickey for all the lands in controversy (Record, page 33, folio 67; page 22, folio 45 and 46).

By such entry the land was segregated from the public domain and was not open for selection by the railway company.

Nelson v. Nor. Pac., 188 U. S. 108.

Ore. Cal. Ry. v. U. S., 189 U. S. 103.

H. & D. Ry. v. Whitney, 132 U. S. 357.
Whitney v. Taylor, 158 U. S. 85.
Kan. Pac. Ry. v. Dunmeyer, 113 U. S. 629.

On July 2, 1903, Bridget Hickey, for the heirs of Jerry Hickey, deceased, relinquished said land to the United States government (R., p. 23, fol. 46), that the said land then and there became government land and a part of the public domain and was subject to entry by the first legal applicant. (R., p. 33, fol. 68.)

H. & D. Ry. Co. v. Whitney, 132 U. S. 357.
Kansas & Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629.
Whitney v. Taylor, 158 U. S. 85, and cases heretofore cited.

The status of the railway company having been fixed and established at the time of its attempted selection in, that the lands were not affected by such selections because of having been previously segregated, the effect of the relinquishment was not to revive or make valid any claim under the original attempted selection, but upon such relinquishment being filed *the land became restored to the great mass of public land and was subject to entry from that time, unaffected by the previous attempted selection by the railway company.*

H. & D. Ry. v. Whitney, 132 U. S. 357.
Kansas Pac. Ry. v. Dunmeyer, 113 U. S. 629.
Johnson v. Towsley, 13 Wallace 72.
U. S. v. Turner, 54 Fed. 328.
Perkins v. Cent. Pac. Ry., 11 L. D. 357.
M. K. & T. Ry. v. Troxel, 17 L. D. 122.

The doctrine set forth by counsel that the entry made by defendant in error should not have been allowed for the reason that the land was already segregated by the railroad company's selection, has no application here, *inasmuch as the land in controversy was not segregated by the railroad company's selection.*

> "The railroad company never had any right therein, it having been segregated at the date of the filing of its selection by the homestead entry then on file, which entry had been canceled prior to plaintiff's application, leaving the land unappropriated vacant and subject to entry at the date of plaintiff's said application."
>
> Swanson v. Galbarth, 21 L. D. 109.

The same principle of law is followed in case of State of California v. So. Pacific Ry. Co., 27 L. D. 542, supra.

In the case of Southern Pacific R. R., 28 L. D. 281, the secretary says:

> "The words 'entry' and 'filing' are technical terms having a well-defined meaning and employed in the various acts pertaining to the disposal of the public domain to indicate the act by which an individual acquires an incentie right to a portion of the public lands under the general land laws (Choteau v. Pope, 12 Wheaton 586), an indemnity selection, however, is not a filing or an entry, as such terms are ordinarily used."

That while the land was government land and a part of the public domain and subject to entry under the laws of the United States government, said defendant in error at the Cass Lake District office

did make cash entry, No. 154, under the Act of Congress approved June 3, 1878, entitled "An act for the sale of timber lands for the States of California, Nevada, and Washington Territory," and the acts amendatory thereof and supplemental thereto, for all the lands in controversy. This entry was in due form and in strict compliance with said law, and was duly allowed by the said district land officers; that said plaintiff was at said time, a citizen of the United States, and a resident of the State of Minnesota, and possessed the qualifications necessary to entitle him to enter land under said act of congress. R., p. 23, fol. 47; page 33, fol. 68.)

That on October 12, 1903, said defendant in error duly made and submitted his proofs under said act of congress to the said district land officers, paid the purchase price of said land, as prescribed by said act, and the land officers' fees and commissions. Said proofs were duly accepted by the said district land officers and said defendant in error was allowed to make and did make entry of said lands under said acts of congress, and fully complied with the laws of the United States and the rules and regulations of said land department, relative to obtaining the legal title to said land (Record, page 34, fol. 69), that the said defendant in error did everything he could do and everything required by law to be done under the stone and timber act and a patent should have been issued to him.

That through a mistake of law on the part of the officials of the government the patent to said land was wrongfully issued to said railway company

when it should have been, with the law properly applied, issued to the defendant in error, who was at said time the equitable owner of said land, and entitled to the legal title thereof.

It is the universal holding of this court that "where through an erroneous construction of the law the land department awards to one person the patent for land, to which another has initiated a prior right, the court will correct the error, and hold the patentee as trustee for him who has the better right."

St. P. & Soo City Ry. v. Winona St. P. Ry., 112 U. S. 720.

St. Paul Pacific Ry. v. Nor. Pac., 139 U. S. 1.

Ard v. Brandon, 156 U. S. 537.

Rector v. Gibbons, 11 U. S. 276.

Johnson v. Towsley, 13 Wallace 72.

Shepley v. Cowan, 91 U. S. 330.

Moore v. Robins, 96 U. S. 530.

26 Amer. & Eng. Encyl. of Law, 329, and cases cited.

It is submitted therefore that the decision of the Supreme Court of Minnesota should be affirmed.

JOHN R. DONOHUE,

Atty. pro se, Defendant in Error.